MARRIAGE LAWS AND DECISIONS IN THE UNITED STATES

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A Manual

BY

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INTRODUCTION

SCOPE OF THIS MANUAL

THIS Manual has been prepared as a companion volume to one just published on Marriage and the State, by Mary E. Richmond and Fred S. Hall.[1] Marriage and the State is an account, based upon field studies in 96 cities in 30 states, of the existing administration of marriage laws in this country. Because of the full treatment of the subject in that volume, this Introduction contains little discussion of the historical background or social importance of the topics considered. And the Manual itself makes no attempt to appraise the strength or the weaknesses of the legislative acts and judicial decisions classified in it. It attempts only to combine comprehensively under a uniform set of headings all the statutory regulations of marriage, and all the pertinent court decisions relating to marriage, within the limits to be explained, in each jurisdiction of the continental United States. It contains 50 uniform outlines treating individually the law of the several states, the law of the District of Columbia, and the federal law so far as applicable. The statute law includes all legislation in force at the end of the 1927 legislative sessions; the decisional law, all printed cases up to January, 1927.

COMMON LAW AND STATUTE LAW

For the assistance of those readers who have no training in the law, it may be well to explain briefly the sources and content of our dual legal system. Law may be divided into statutory law and common law. Statutory

[1] Russell Sage Foundation, New York, 1929.

law is enacted by local law-making bodies, in the American states by the legislatures. These laws are published after each legislative session in volumes commonly known as session laws. Periodically such session laws as are of a general public nature are compiled by subjects into volumes known as Codes, Consolidated Laws, Revised Statutes, and the like. These Codes are in turn amended and supplemented by later session laws. Such then is the source of our statutory law, the expression of the will of the people through their accredited representatives.

Behind these statutes and independent of them is the common law. In theory it is a universal concept (in English-speaking countries) existing even as social relations themselves exist. It is unwritten in the sense that any social system is unwritten: the evidences, the interpretations of it alone are written. Such interpretations are expressed in decisions of courts on particular cases coming before them. They are an expression of the application of this body of the common law to the particular set of facts in litigation. The court decisions theoretically do not create the common law; they express it. The volumes containing these decisions when published are known as reports. Usually only the decisions of the higher courts are printed; these are rendered in cases on appeal which discuss almost exclusively questions of law rather than questions of fact.

To some degree court decisions interpret the statutes. To a larger degree they express the common law. And even in the interpretation of statutes courts are guided by common law principles in the absence of a special statutory regulation. Statutes are considered by the courts to be enacted in relation to the common law, the

existing system; where they do not specifically change it, the system is assumed to continue.

Because of the change in social concepts since the crystallization of common law principles, marriage is a matter regulated by statute to a comparatively large extent.[1] But in so far as it is not so regulated the common law still persists. It may be well to state briefly the elements of the common law relating to marriage.

THE COMMON LAW RELATING TO MARRIAGE

The word "marriage" is capable of two distinct meanings. It may mean a civil contract between persons of opposite sex to become husband and wife. Or it may mean the relationship of husband and wife, the legal status growing out of the contract. Once established, this status of marriage is a public concern different from any contract in that the parties to it cannot legally terminate or modify it by any subsequent agreement: the rights and obligations arising out of the status are fixed by law. It is the legal union for life of one man and one woman to discharge toward each other and toward the community the duties imposed by law on persons related as husband and wife. But the purpose of this Manual is not to treat of the law of husband and wife or of the law governing the dissolution of that relation once properly entered into; its scope is limited to the requirements for the formation of the marriage contract and to its abrogation when not properly entered into.[2]

[1] See also Marriage and the State, by Mary E. Richmond and Fred S. Hall, Russell Sage Foundation, New York, 1929, pp. 41 and 335.

[2] If the strictest terminology were still used, it could be said that this Manual will treat of the requirements for entry into marriage and of annulment or declaration of nullity of marriage when not

As to the contract of marriage itself then, the law considers it as it considers all other civil contracts. It is valid if at the time of its making the parties were *willing* to contract, were *able* to contract, and actually *did* contract in the forms prescribed by law. Marriage, in other words, is based on the consent of competent parties.

It is consent alone that is the essence of the marriage contract; without consent there can be no contract; with consent no further act, such as cohabitation, is necessary.

In addition, the consent must be given by competent parties. All persons are able to contract marriage unless laboring under some disability. These disabilities were originally of two sorts: canonical, which made the marriage voidable only upon sentence of nullity by an ecclesiastical court during the lives of both parties; and civil, which made the contract void ipso facto.

The civil disabilities preventing the formation of any marriage contract at all are of three sorts. The first is a prior marriage. Monogamy being the social system in Christian countries, a marriage to another person during

properly entered into. Declaration of nullity is a mere judicial decree upon determination of the facts, which may be disputed, of the nullity of a marriage contract already void ipso facto. Annulment is a decree that a defective marriage contract is void ab initio but not ipso facto: in order to establish the nullity a decree must be rendered during the lifetime of both parties to the marriage. Equitable principles obtain and may bar action. Divorce properly is a decree dissolving the marriage not because of a defect in the marriage contract but because of some fact arising thereafter and made by statute a cause for dissolution of the marriage status. Statutes, however, frequently declare as grounds for divorce causes which strictly would render a marriage void absolutely or subject to annulment. In such instances discussion of divorce is included in the Manual, the substantive consideration being the validity of the marriage contract.

the lifetime of a spouse, if the prior marriage has not been legally ended, is void absolutely and constitutes a felony.

Unsoundness of mind creates a second incapacity. Without mental competency there could be no real consent to a contract. The marriage of a lunatic, if not entered into during a lucid interval, is absolutely void.

Want of sufficient age, the third disability, since it implies lack of judgment as well as lack of physical capacity, prevents entry into marriage as it prevents entry into other contracts.[1] The ages of consent for marriage—fourteen years for males and twelve for females—were taken over by the common law from the Roman law.[2] The marriage of persons below such ages was only inchoate or imperfect: it was so far a marriage that if the parties upon arrival at the age of consent agreed to continue together no new marriage was necessary; it was so far imperfect that when either party became of the age of consent he or she might disagree and declare the marriage void without court decree. The ecclesiastical law set the age of seven years in both sexes as an absolute minimum below which a marriage could have no validity.

As early as the time of Blackstone there was a fourth impediment. Under the strict common law if the contracting parties themselves were of the age of consent to marry—twelve or fourteen years—their consent alone

[1] See Marriage and the State, Chapter VI; also Child Marriages, by Richmond and Hall, Russell Sage Foundation, New York, 1925.

[2] The age of consent to marriage must in no way be confused with the female's age of consent to carnal intercourse. Though it often happens that by statute these two ages are identical, their origin is entirely different.

sufficed to create the marriage contract. Later, however, statutes were enacted which required also the consent of the parents of parties who had not yet attained a more advanced age. These early English statutes, though enacted prior to American independence, were not taken over and considered a part of the existing law of this country.

Of the canonical disabilities to marriage, but two are of continuing importance, corporal impotence and consanguinity and affinity. Impotence, if not a ground for divorce, is generally a valid ground for annulment under American laws.

More complicated are the disabilities of relationship, consanguinity and affinity. As these rested on Biblical law, they were within the exclusive jurisdiction of the ecclesiastical courts, but so far did the Church extend the interpretations of Chapter XVIII of Leviticus that the temporal authority intervened during the reign of Henry VIII. Under statutes then enacted and the decisions interpreting them[1] no marriage was to be impeachable beyond the degree of uncle and niece. This probably included likewise aunt and nephew. Computing then according to the civil law, marriage was prohibited between a man and his mother, grandmother, great-grandmother, his daughter, granddaughter, great-granddaughter, his sister, his aunt, and his niece, and between a woman and her corresponding relatives. The prohibitions applied to the persons so related whether by the whole or half blood or by marriage or through legitimate or illegitimate birth.

[1] 25 Henry VIII, ch. 22, §3; 33 Henry VIII, ch. 38; Hains v. Jescott [Jefcot], 5 Mod. 168 or 87 Reprint 587; *Ibid.*, Comberbach, 356 or 90 Reprint 525; Butler v. Gastrill, 1 Gilb. Rep. 158 or 25 Reprint 110.

Not only must the parties to a marriage be willing and able to contract but they must actually contract in due form according to law. This brings us to the question of common law marriages. It is now generally conceded that no solemnization by the Church was necessary to the validity of a marriage according to the common law. If the parties agreed in words of the present tense, *per verba de praesenti*, to become husband and wife, a marriage was constituted and was valid for many purposes. If the parties agreed to become husband and wife in the future and followed this by cohabitation, a marriage was created *per verba de futuro cum copula.* It is not necessary here to discuss the rule that ecclesiastical courts could then compel the parties so married to go through a marriage ceremony by a priest, for this procedure has never been a part of American law. And inasmuch as the English statute of 1753 requiring a religious ceremony for the validity of marriage has similarly not been considered a part of American common law, Chancellor Kent early enunciated the doctrine that a contract *per verba de praesenti* or *per verba de futuro cum copula* constituted marriage in New York. The latter doctrine is of little importance, for in the very few states where actual decisions have recognized the validity of contracts *per verba de futuro* the *copula* itself is considered as constituting a present consent to actual marriage. In more than half the states marriages *per verba de praesenti* have been accepted by the courts as valid in the absence of a statute specifically declaring the nullity of marriages which do not conform with statutory requirements; the requirements have been held directory only and not mandatory. But since 1875 legislation in

some states has directly abolished this rule as to the formation of marriage contracts according to the common law, and in 24 states such contracts are no longer valid.[1]

STATUTE LAW RELATING TO MARRIAGE

Superimposed upon this system of the common law which, it must be remembered, continues to exist in so far as it is not directly modified by statute, are the statutes which regulate marriage. These statutes relate to the licensing and solemnizing of marriage, to the recording of returns, to the crimes connected with the marriage status as it is known under our social system, to the state's supervisory power over it, to the relations between states concerning its validity.

PLAN OF THIS MANUAL

That the state is interested in every marriage is obvious. To assure a regard for its interest is the purpose of the administrative regulations of marriage, to which end publicity is an important tool.[2] Publication of banns is one method of protecting this social concern. But in this country that method has been largely abandoned, and the system of marriage licenses has been substituted. The marriage license provides a method of administrative control which can be made effective: it centers in one officer the duty of protecting the state's interest by requiring of him certain specific acts before issuing the license. Under the system of banns, the raising of objec-

[1] See Marriage and the State, p. 370.

[2] See, however, Marriage and the State, p. 181.

tions to a marriage which may be unlawful or invalid is left to any casually interested person; under the system of licensing, the ascertainment of the objections is made the duty of a public officer. Licensing is a method of determining before marriage by an administrative process the elements of validity and invalidity which otherwise could be rectified only by a judicial process after marriage.

It is because of this growing tendency to make control of the marriage contract an administrative function through the system of licensing that so many of the elements concerning the validity of the marriage are grouped in this Manual under the heading, "The Marriage License." In some instances, as in questions relating to the minimum age of consent or to mental and physical qualifications for marriage, the statutes may not yet make the requirements a condition precedent to license issuance: they may leave the regulation to the courts if the question arises on action for annulment. But nevertheless the statutory provisions on these subjects and the court decisions in regard to them appear in the Manual under the heading, "The Marriage License."

Only when an element is of such a character that its effect on the validity of marriage must be determined usually by judicial action after marriage rather than by administrative inquiry before marriage has it been placed under "Other Requisites" rather than under "The Marriage License," or "Solemnization." And wherever there appears any tendency to connect those elements with license issuance or with solemnization the instances are referred to under a miscellaneous classification at the end of such sections.

To make the classification clearer an outline of the various headings follows, and then explanations of what each one covers.

1. The Marriage License
   a. Requirement
   b. Issuer
   c. Compensation of Issuer
   d. Personal Appearance by Candidates
   e. Advance Notice and Objections
   f. Minimum Age
   g. Parental Consent
   h. Mental and Physical Qualifications
   i. Form of License
   j. Record of License
   k. Other Provisions
2. Solemnization
   a. Officiant
   b. Officiant's Credentials
   c. Presentation of License
   d. Form of Ceremony
   e. Common Law Marriage
   f. Irregular Solemnization
   g. Other Provisions
3. The Marriage Record
   a. Marriage Certificates
   b. Local Record
   c. State Record
   d. Evidence
4. Other Requisites
   a. Proper Relationship
   b. Proper Civil and Racial Status
   c. Proper Legal Status
   d. Proper Consent of Parties
5. State Supervision
6. Interstate Relations
7. Sex Offenses and Marriage

1. The Marriage License

a. Requirement.—Here appear the statutes prescribing issuance of license and in three states the alternative of publication of banns. Court decisions under the statutes declare whether the requirement is directory only or mandatory, which depends largely upon whether common law marriages are recognized notwithstanding the statutes. In a few states, however, though solemnization is essential to the validity of a marriage, a license is not.

b. Issuer.—The statutes prescribe the specific officer or officers who in each instance may issue marriage licenses, generally a county official or, in some states, the town or city clerk.

c. Compensation of Issuer.—The candidates for license pay to the issuer a fee stipulated by statute. Whether the officer retains this fee as his personal remuneration for the service rendered, whether he pays all fees collected into the state or county treasury and receives a salary as sole compensation, or whether his salary, though fixed, is limited in maximum to the fees collected, may exercise a strong psychological influence upon his inclination or disinclination to issue the license, upon the care which he uses to ascertain the fitness of the candidates for marriage. It is to be noted that the subject is difficult of classification: statutes as to fees and salaries are frequently changed and are sometimes dependent upon local or special laws. The court decisions included are only those interpreting the present, existing statutes and only those applicable to the office of issuer, not those applicable to some other office which may be held by the same person.

d. Personal Appearance by Candidates.—If the license issuer sees before him the parties to the proposed marriage, not only can he determine more accurately their qualifications in relation to the state, but he can make more certain that each party knows the other's qualifications and attitude. Particularly does such joint examination lessen the possibility of fraud or force inducing the marriage. Statutes may require the appearance of one of the parties or of both, and may provide alternative procedure in cases where physical inability precludes presence in person. If there is no statutory provision, a third person may be allowed to obtain the license, neither party to the marriage appearing.

e. Advance Notice and Objections.—A movement which began in New England and is gradually spreading elsewhere aims to prevent hasty and ill-advised marriages. It has resulted in the enactment of statutes which usually require application for license to be made a prescribed number of days before license may be issued. Sometimes these statutes provide that the license, although issued upon application, shall not permit the solemnization of the marriage until the expiration of a certain period. Exceptions may be made where public policy might dictate immediate marriage. During the prescribed interval persons with objections to the proposed marriage may present them, in which case a procedure is sometimes provided for the determination of the candidates' qualifications. And even if there is no interval prescribed, a similar procedure may be provided in case of objections or refusal of license. Provisions for objection to the marriage at the time of ceremony appear under "Solemnization—Other Provisions."

f. Minimum Age.—Statutes on this subject are diverse. Theoretically they might best provide an age below which marriage is prohibited and voidable and below which the issuance of a license is forbidden. But unfortunately the ages for voidability and for license issuance may be different, either because the statutes make them so or because one age is set by statute and the other considered still to be that fixed by the common law. If the statutes contain a minimum age for license issuance, such provision appears first in the classification. If the statute fixes an age below which marriage itself is prohibited, that may constitute a "legal impediment" to marriage, in which case in some 20 states the issuance of a license is prohibited. There will then appear in the outline a cross-reference to the provision as to legal impediments, which is cited under "The Marriage License—Other Provisions." Because of the confusion on the subject there are numerous court decisions as to age requirements. Included here are not only cases interpreting the statutes but all those concerning minimum age of consent for marriage. It is to be recalled that not only in the absence of a statute does the common law persist but also it affects the interpretation of the statutes.

g. Parental Consent.—Requirements for consent of parents or guardians to the marriage of minors being much more explicit than those concerning minimum age, the statutes almost universally make such consent a condition to the issuance of licenses to minors. Though statutes occasionally provide for annulment on action by the minor's parent, generally absence of parental consent does not affect the validity of the marriage of a person who is over the minimum age of consent for marriage.

Court decisions hereunder concern such validity and concern penalties for failure to obtain parental consent and falsification of it.

h. Mental and Physical Qualifications.—The requirements under this heading are so diverse as to require some classification. Roughly they will be considered under three headings: mental unsoundness, including insanity, idiocy, and epilepsy; communicable disease, which generally means the various venereal diseases and tuberculosis; and pregnancy and unchastity. Mental and physical fitness is made a condition precedent to license issuance only in about one-half the states; but, as in the case of minimum age, such unfitness may constitute a legal impediment to marriage and indirectly may thus preclude the person from obtaining a license. The recent statutes on the subject of examinations for venereal diseases prior to license issuance are quite specific in their requirements. The other statutes included under this heading pertain largely to the validity of the marriage of the person declared by them to be incompetent. As under the common law, the marriage of a person incapable of understanding is void, or now generally voidable, for want of ability to consent. Similarly, as under the common law, the marriage of a person physically incapable may be voidable. Though decisions on the subject of impotence are omitted because that is an ailment generally to be discovered only after marriage, cases concerning venereal diseases, which are included, are decided mostly on the basis that physical incompetence makes a marriage voidable. Pregnancy existing at the time of marriage and antenuptial incontinence are seldom considered absolute bars to marriage; it is the

fraud concerning them which vitiates the contract. In such cases the decisions are treated more fully under "Proper Consent of Parties."

i. Form of License.—The statutes generally state what questions shall be answered in the license. Sometimes the form is specifically set forth; sometimes the prescription of it is delegated to a state department, the one in charge of the registration of vital statistics. The form of license is important in that the substantive provisions for issuance are disclosed largely through the questions submitted to the applicants.

j. Record of License.—In the majority of states applications for license must be recorded at the time of license issuance. Where this is not done, there is no record concerning the marriage if the officiant fails to return the certificate after solemnization.[1] The record at the time of issuance is important also if the statute sets a limit on the time for which a license is valid. This is especially important because of change of conditions over periods of time.

k. Other Provisions.—This division is a catch-all for miscellaneous requirements imposed upon the license issuer and upon the applicants for licenses. Often the questions which the issuer shall propound to the applicant are prescribed; often, too, there is a provision authorizing the issuance of licenses in the absence of legal impediment; sometimes the period is prescribed during which a license may remain valid; and in a few southern states, a bond is required of the applicant, usually in a small sum, conditioned upon the absence of

[1] See Marriage and the State, p. 295.

any disability of the parties for marriage and upon fulfilment of statutory requirements. Though any specific penalties for the violation of individual requirements concerning license issuance are included under the headings to which they pertain, the general penalties upon the issuer for neglect of his duties in this connection, or upon the parties themselves or other persons for violations or for falsification, are included in this miscellaneous category, and cross-references to them then appear under each individual heading to which they might be applicable.

2. Solemnization

a. Officiant.—Statutes provide what civil or religious officials may solemnize the rites of marriage. Marriage under special forms may be allowed to members in certain church societies which do not have a minister, such as the Society of Friends. Decisions as to who is an authorized officiant are comparatively rare under the more recent statutes.

b. Officiant's Credentials.—In order to make sure that a religious officiant is really authorized by his church or denomination to solemnize marriages and that he comes within the statutory definition, statutes frequently require that he present his license or credentials of authority to a designated state officer who will record them.

c. Presentation of License.—Unless the law requires that the parties present their marriage license to the officiant before he undertakes to solemnize the marriage, the very purpose in requiring a license would be defeated, since a marriage is generally valid if properly solemnized notwithstanding the absence of a license. The officiant is usually subject to penalty for failure to demand the

license before ceremony. Or if there is no direct provision to that effect, he may be punished under a more general statute for solemnizing a marriage without authority.

d. Form of Ceremony.—Seldom are the statutes very specific. Though they may specify that the parties must take each other as husband and wife, the important provision is that requiring a certain number of witnesses at the ceremony. There are special provisions as to the form of marriage for members of religious societies having peculiar rites as to marriage, such as Quakers, Mennonists, et cetera. The marriage of Indians according to tribal customs is sometimes recognized as valid.

e. Common Law Marriage.—In the absence of any statute whatsoever marriages valid according to the common law[1] will be valid. Statutes are of three sorts: they may directly recognize the validity of common law marriages; they may directly deny validity to marriages not licensed or solemnized as required; they may regulate marriage but make no specific provision as to the invalidity of a marriage not in conformity with the regulations. In the first case the statute is merely declaratory of the common law, the rules of which then continue in force. The statutory denial of validity to common law marriages is mostly a recent movement in states where the validity of such marriages, asserted by the courts, has led to social difficulties.[2] The statutes do not make invalid those common law marriages contracted prior to their enactment. It is the less specific statutes, in which no mention is made of common law marriages as such, that raise the difficulty. Generally the doctrine of

[1] See p. 11.

[2] See Marriage and the State, p. 28.

Kent is followed, given impetus by Meister v. Moore (96 U. S. 76, 1877), that unless the statute contains express words of nullity a marriage good according to the common law is valid notwithstanding statutory requirements as to license and solemnization. In certain states having no more specific statutes, however, the courts have denied this and, finding in some terms of the statutes, in the general legislative history, or in public policy, a repudiation of the common law doctrine, hold as an absolute nullity a marriage without the required solemnization. Even where marriages contracted by present verbal consent are recognized, contracts *per verba de futuro cum copula* may be denied validity by the courts as contrary to American institutions. Numerous decisions interpret how a common law marriage may be established in absence of proof of a verbal contract—by evidence of cohabitation, reputation, and conduct as husband and wife.

Where common law marriages are recognized as valid a doctrine usually obtains that should the parties go through the marriage ceremony during the existence of an impediment to their marriage, their continued cohabitation as husband and wife after removal of the impediment may establish a marriage without the direct interchange of any new consent. The variations of this doctrine are numerous, based upon questions of good faith of one or both of the parties, and ignorance of the impediment and of its removal, and upon the relation of such questions to the legal presumption that a relation illicit in origin continues so.

f. Irregular Solemnization.—The unfortunate consequences which would arise if, by some inadvertence in

the issuance of a license or in solemnization, a marriage thought valid by both parties should prove in fact to be invalid, are often guarded against by statute. The question does not arise, of course, where common law marriages are recognized as valid. But a possibility of wider significance is usually guarded against in the same sort of statute, that of marriage by a mock minister. If a person represents himself as authorized to solemnize marriages and in such capacity does solemnize a marriage which either one or both of the parties believe to be valid and which they later consummate on the strength of this belief, the marriage is valid notwithstanding his want of authority. A penalty is often provided to punish a person who solemnizes or purports to solemnize a marriage when not authorized.

g. Other Provisions.—The miscellaneous statutes putting on the officiant duties beyond that of requiring of the parties a license are an added safeguard against the performance of illegal marriages. Such statutes frequently prohibit the solemnization of marriages which the officiant knows would be contrary to the marriage law or to which a legal impediment exists. Specific provisions may prohibit the solemnization of a marriage which is known to be miscegenetic or incestuous, the marriage of a person who is physically or mentally defective or to whose marriage parental consent has not been given as required.

3. The Marriage Record

a. Marriage Certificates.—Generally the officiant must give to the parties a certificate of their marriage, and universally he must return to some designated official a certificate of the marriage within a specified time as a

basis for the record of marriages. Penalties are provided. In instances where a marriage is solemnized between members of a religious body having no minister, the return is required to be made by the presiding officer, the moderator, or the clerk of the minutes of the meeting in which the marriage is solemnized. For brevity such person is called in this Manual "the witnessing clerk."

b. Local Record.—The town or county official to whom the certificate is returned is required to record it. Occasionally he may have to send a copy of the certificate to some other local official at the place of the parties' residence. Generally there are penalties provided for failure.

c. State Record.—In more than half of the states the local recorder must make return of marriages to some state officer, such as the State Registrar of Vital Statistics or the Secretary of the Board of Health. Court decisions as to vital statistics are not included herein unless the specific case has reference to marriage.

d. Evidence.—The main use of marriage certificates and their registration is in judicial and administrative proceedings. The statutes and decisions included herein relate only to proof of marriage by the written returns and records treated under the other headings of this division: the records of the state where the case is decided and the records of foreign states, the unofficial records of ministers and religious societies, and the certificates of the officiants given to the parties. Such evidences of marriage not included herein pertain to the admissibility of other record evidence not directly relating to proof of marriage and to proof of marriage by witnesses to the ceremony or by cohabitation and repute of marriage.

4. Other Requisites

a. Proper Relationship.—The statutes prescribe directly with which of one's relatives intermarriage is prohibited. Where the prohibitions specified are reckoned by degrees, the civil law rule is always used, counting from the person in question back in generations to the common ancestor and then forward to the other party. Such marriages may be declared to be void, or voidable on court decree; if merely prohibited, courts tend to declare them voidable only in accordance with the common law. The penalty in most cases is a part of the statute as to incest.

b. Proper Civil and Racial Status.—Southern and western states generally prohibit marriage between persons of Caucasian blood and those of Negro blood or descent, and in some cases the intermarriage of Caucasians with members of other races besides Negroes. Miscegenation generally makes a marriage void. In a few states the marriages of criminals, who are considered as civilly dead, are void for incapacity to contract. The same was formerly the case with paupers. Consideration of the marriage of slaves, whose civil status rendered them legally incapable of contracting marriage, and of the validation of their cohabitation by statutes after emancipation, is omitted from this Manual as no longer of administrative and now seldom of judicial importance.

c. Proper Legal Status.—Though the marriage of a person having a spouse living is usually void absolutely, some statutes make such later marriages void only upon judicial declaration of nullity and that—by statute or

decision—only when action is brought by the innocent and injured party. Material concerning unlawful cohabitation or continuance of cohabitation under a bigamous marriage contracted elsewhere is not included. Bigamy is, of course, punishable as a crime. But there is an exception to bigamy statutes if the prior spouse has been absent for a period of years—usually from three to seven—and the presumption of death has arisen. The subsequent marriage after the presumption of death has arisen is void if the prior spouse is discovered to be in fact alive, except under statutes in a comparatively few states which declare it voidable only, usually upon option of the returned spouse.

Although an absolute divorce severs the marriage relation, two things may stand in the way of remarriage after decree: the judgment may be interlocutory for a period and the marriage not finally dissolved or, notwithstanding the finality of the decree and dissolution of the marriage, the statute may prohibit remarriage. The prohibition may apply to the guilty party only or to both parties. In case of application to both parties, one object is to prevent the desire for a hasty remarriage from becoming a dominating cause for divorce; another is to eliminate confusion in the rights of issue if the woman, pregnant at the time of divorce, should remarry directly. In statutes applying the prohibition only to the guilty party remarriage may be absolutely forbidden for a period or without judicial permission, or remarriage of such party after a divorce for adultery may be forbidden with the paramour only. Whether a later marriage in contravention of the prohibition is void, and whether its nullity is dependent upon its being con-

tracted in the state granting the decree or obtains no matter where the later marriage is contracted, depends upon whether the statute is interpreted as imposing a mere penalty or as creating in the person an absolute incapacity to contract a later marriage.

Included under this heading are also the decisions stating the legal presumption in favor of the validity of a marriage: in case of dispute concerning two marriages, the presumption in favor of a later ceremonial marriage puts on the opponent thereof the burden of proving the continued subsistence of the earlier.

a. Proper Consent of Parties.—Hereunder are four topics. The first deals with matrimonial intention as a requisite to the validity of a marriage contract, discussing the decisions as to marriages made in jest, the agreements to cohabit which are not real marriages, the necessity for consummation, and including any statutes penalizing false personation of another person at a marriage ceremony. The second topic concerns annulment for fraud and the elements which are considered to constitute fraud. The third concerns force or duress as a cause for annulment and includes any statutes punishing one who compels a woman to marry. The decisions as to fraud or force are, of course, numerous. The fourth consideration is the ratification of a voidable marriage by cohabitation or other recognition of the relation after removal of the cause for voidability.

5. State Supervision

Through some state department or officer—the Department of Health or the Registrar of Vital Statistics—a growing number of states are integrating the local

administration of marriage. The methods used are the supplying of forms and blanks for license issuance and for recording; and the supervising of the system of registration of marriages.[1]

6. Interstate Relations

The general rule of the common law is that a marriage valid where contracted is universally valid if not contrary to the law of Christendom (polygamous or incestuous) or to public policy as expressed by the law-making body.[2] Some states have statutes which are merely declaratory of this already existing rule. To prevent their domiciliaries from going elsewhere to contract a marriage in evasion of their statutes which concern matters not included in the common law rule, some states have adopted the Uniform Marriage Evasion Act or a less inclusive act of their own. The uniform law was so drawn, however, as not to invalidate elsewhere all marriages prohibited at home, and it is being interpreted only to accord with the exceptions to the common law rule and to make void those marriages which are expressly declared void by the law of the parties' domicil—those which are polygamous, incestuous, or contrary to public policy. Other prohibitions upon marriage, if not creating in the parties a personal incapacity to marry, have no extra-territorial effect.

7. Sex Offenses and Marriage

Interesting as examples of the constant tendency of the law to encourage marriage are the statutes and

[1] See Marriage and the State, Chapter XV.

[2] See, however, Marriage and the State, pp. 194 and 195.

decisions which bar or suspend prosecution in cases of seduction, rape, fornication, bastardy, and the like, upon the marriage of the defendant with the prosecutrix, or even upon the bona fide offer of marriage. Specific provisions of the statutes of some states which provide that abandonment of the woman within a specified period without cause will revive the prosecution are omitted.

CITATIONS, CLASSIFICATION, AND FORM

The references to the statutes of the several states are those officially recognized, where such citations are practicable. In a few states where the official compilation is long out of date, the unofficial compilation in current use is referred to. In such cases the official citation may also be given.

Case references are to official reports wherever such are published. In instances of "side reports" of lower courts, printed only unofficially, alternative citations are given where possible so that the case may be consulted in any series of reports in which it appears. If the official volume including the late cases was not available, reference is made to the National Reporter System; wherever else such unofficial citations appear the opinion seems not to be printed officially. The reports mentioned under "References" in the outline of each state are the latest volumes consulted of the current official series; all earlier series, however, from colonial times forward have been consulted and are cited. Space does not permit a list of the abbreviated names of the reports; explanation of the abbreviations may be found in any law library or manual on legal research.

Opinions of attorneys general usually are not included. In some instances of administrative importance where an attorney-general's opinion is binding on officials in the absence of a court decision, it may be cited as a note of explanation.

The court opinions of one state, or the decisions of federal courts sitting in one state, interpreting the law of another state, are not included because they are of no controlling value as decisions. But even though there exists no federal common law in the sense that there exists a common law in each state, decisions of federal courts on general questions not connected with the law of the state where such courts are sitting are classified under the heading, "Federal."

A final word remains to be said about the literary form of the compilations. Paragraphing under the main headings is rare and occurs only where such a break will assist the reader mentally to classify the material thereunder. Sentence structure is a matter of some difficulty caused by the large amount of material in proportion to the possible amount of space. Statutes are as closely digested as is compatible with retaining the fulness of the meaning of their provisions; the wording of the law is followed approximately where sufficiently concise. The exigencies of an outline require the splitting up of various provisions often stated in a single section in the statutes.

In the material taken from court decisions all facts of the individual cases have had to be omitted. So numerous are the decisions on some subjects and so diverse the headings that, in order to give a semblance of cohesion to the discussion, sentences are often long and burdened

with numbered citations. The citations will be found to follow in the sentence the very phrase or clause which states the decision of the case to which they refer. A conclusion of a court, though it happens to appear in a dependent clause of a sentence, is of course a direct and affirmative decision. If the reader is using the Manual only to get a survey of the provisions of the law and not as a digest for consulting the decisions themselves, it is suggested that he allow his eye to neglect notice of the interpolated citation references and to read the sentences as entities.

LIST OF ABBREVIATIONS

A.	Acts
C.C.	Civil Code
C.C.P.	Code of Civil Procedure
C.L.	Compiled Laws
C.P.A.	Civil Practice Act
C.S.	Cumulative Statutes
Const.	Constitution
Crim. L.	Criminal Laws
G.L.	General Laws
G.M.	Geoffrey May
G.S.	General Statutes
L.	Laws
O.A.G.	Opinions of Attorney General
P.A.	Public Acts
P.L.	Public Laws
Pen.C.	Penal Code
Pen.L.	Penal Laws
Pol.C.	Political Code
R.C.	Revised Code
R.S.	Revised Statutes
S. or Sup.	Supplement
S.L.	Session Laws
St.	Statutes

NOTE: In the list of court decisions following the state summaries the name of the state is generally abbreviated to the initial letter thereof. Thus Alabama, Arizona, and Arkansas are all designated by "A.," the distinction being whether the "A." appears under Alabama Cases, Arizona Cases, or Arkansas Cases. As to abbreviations of reporters' names in citations, see Introduction, page 29.

ALABAMA

REFERENCES: Code of Alabama (four volumes), 1923; Constitution of Alabama, amended through 1923; General Laws of Alabama, 1927; Reports through Volume 214 Alabama and 20 Appellate.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Code and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Alabama section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—No marriage shall be solemnized without a license (8998). *A marriage without a license and without observance of other statutory provisions is not invalid (1). But if not consummated by cohabitation a marriage is valid only if solemnized by virtue of a license (2, 3, 4).* [*See also cases under* 2e.]

b. Issuer.—License is issued by the judge of probate of the county in which the woman resides or in which the ceremony is to be performed (8998). *A marriage performed by authority of a license signed in blank by the probate judge and issued by a justice of the peace is not valid if not consummated by cohabitation (2, 3, 4). The probate judge is liable for the penalties for misissuance of licenses by justices of the peace (5), and by clerks who, though not qualified deputies, are authorized by the judge generally to issue licenses (6). Non-residence of the female in the county in which the license issues does not invalidate the license or render void the marriage solemnized under it (7).*

c. Compensation of Issuer.—For issuing and recording license, consent to the marriage, and certificate of celebration, and taking and recording bond, judges of probate are entitled to a fee of $1.50 (7285). In no case shall a license fee, including the 25 cents for reporting marriage to the State Board of Health, exceed $2.00 (1153). The salary of judges of probate in counties having population of 75,000 to 95,000 shall be $6,000 per annum (G.L. 1927, pp. 219 f. §1). All fees collected by said judges of probate shall be turned in to the county treasury (*Ibid.* §3).

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—[No provision as condition to license issuance.] A man under seventeen and a woman under fourteen years are incapable of contracting marriage (8993). *A marriage of a minor under the statutory age is voidable, but until disaffirmance it is a marriage in fact (8). For disaffirmance of an under-age marriage a judicial annulment is necessary (9). The right of action for such annulment is personal to the minor (10). An under-age marriage may be ratified by cohabitation after attaining the statutory age (11). The fact that the male is a minor over seventeen years does not prevent the formation of a valid common law marriage (12).* [The Attorney General has held that the criminal provision as to carnal knowledge of a girl under sixteen years does not prohibit or apply to a marriage of a girl under sixteen (Reports of Attorney General, 1918–1920, p. 130).—G.M.] [As to penalty on officiant for knowingly solemnizing a marriage of parties under the age of legal consent, see 4943 under 2g.]

g. Parental Consent.—If the man is under twenty-one years and the woman under eighteen, and not previously married, the consent of the parents or guardians is required, given either personally or in writing, the execution of which writing must be proved (8999). *Penalty.* A judge of probate issuing a license for the marriage of a minor contrary to the provisions of this chapter forfeits $200 to the parent or guardian, who may sue for the same (9002) unless at the time of issuance an affidavit was made by such minor, or some other credible person, that the minor was of the required age (9093). [Note: Any person taking any girl under fourteen years from her father, mother, guardian, or other person having legal charge of her, for the purpose of marriage, must be imprisoned not less than two years (3185).] *The statutory requirement for parental consent is directory only, and the marriage is valid and not voidable regardless of the lack of such consent (13). The statute, though phrased in the conjunctive, requires parental consent if either party be under the prescribed age (14, 5). The consent must be given personally or in writing as prescribed by statute: oral consent transmitted by another does not suffice (15, 16). The daughter's representation that she is of age is not adequate to protect the judge, who must by statute require an affidavit (17), and the personal appearance of the minor must justify the belief that he is of age (18); the honest belief of the judge that the infant was of lawful age is no defense (14). "The consent of parents or guardians" means the consent of the father if living and not incapable, or if there be no*

father, then of the mother (18). The father does not forfeit this right by moral turpitude (7, 15). The liability attaches upon misissuance of the license, and it is immaterial that the parent did not attempt to prevent the marriage (6). The clerk must prove affirmatively, as from the record, that parental consent was given (19). Under an early statute the punishment of the clerk was by penalty forfeited to the person suing and later to the parent (20, 21, 22, 23).

h. Mental and Physical Qualifications.—No license shall be issued and no marriage shall be entered into in any manner whatsoever unless the male party within fifteen days prior to license application has been examined as to the existence of any venereal disease and has filed with the judge of probate a certificate stating that he is free from venereal diseases so nearly as can be determined by a thorough examination and recognized clinical and laboratory tests, when in the discretion of the examining physician such tests are necessary (1156). [Note: Duly licensed physicians may make the examinations and their charge shall not exceed $5.00. The county health officer will make the examination without charge (1157).] *Penalties.* Any judge of probate unlawfully issuing a license to any male failing to present a certificate stating that he is free from venereal diseases shall be fined from $50 to $100 or sentenced to hard labor not exceeding six months or both (4383). Any physician knowingly making any false statement in the certificate as to venereal disease shall be fined not more than $100 or sentenced for not more than six months' hard labor (4384). *Lunacy of one of the parties will avoid a marriage contract, and though a marriage void for insanity requires no judicial pronouncement to make it so, a court decision is conducive to good social order [dictum], but a marriage contracted during a lucid interval is valid (24). It has since been doubted whether insanity at the time of marriage would afford equity jurisdiction for annulment (25, 26).* Divorce may be granted to the husband when the wife was pregnant at the time of marriage without his knowledge or agency (7408).

i. Form of License.—The license is authority to any qualified officiant to marry the persons therein named (8998).

j. Record of License.—The judge of probate must register in a book all licenses issued, stating whether the parties were of the age specified, or if not, whether consent of parents or guardians was given for parties not previously married. He must transcribe written consent on the same page on which he records the license; such record, or a certified copy, is presumptive evidence of the facts (9000). *The record of the license is prima facie evidence to protect the issuer*

by showing that parental consent was given (19). Penalty. Any judge of probate failing to record a license for more than five days after return by the officiant, or to record any consent required by law, is guilty of a misdemeanor (4942). [Note: Any person committing a misdemeanor must be fined not more than $500, and may also be imprisoned not more than six months (5277).] [See 4945 under 3a.]

k. Other Provisions.—The judge of probate must require a bond to be executed in the penal sum of $200, payable to the state, with condition to be void if there is no lawful cause why such marriage should not be celebrated (8999). *Though marriage license issuance is a ministerial, not a judicial function (6, 14), it is a duty involving discretion, official and personal, such as the law does not allow to be unauthorizedly delegated (2). Penalty.* Any probate judge knowingly issuing a license for the marriage of any persons prohibited from intermarrying by the section concerning miscegenation must be fined from $100 to $1,000 and may also be imprisoned not more than six months (5002). [As to reporting violations of marriage laws to solicitor, see 4945 under 3a.]

2. SOLEMNIZATION

a. Officiant.—Marriages may be solemnized by any licensed minister of the Gospel in regular communion with the church or society of which he is a member; by a judge of the supreme, appellate, or circuit court within this state; by a judge of probate or any justice of the peace within his county (8995); by the pastor of any religious society according to the rules of such society (8996); and by Mennonists, Quakers, et cetera, according to their forms (8997).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—No marriage shall be solemnized without a license, which is authority to anyone qualified to marry the persons therein named (8998). *Penalty.* Any authorized officiant who joins persons in marriage without a license as required, or goes out of the state and marries persons, one or both of whom reside in this state, without such license, or a license from the state in which the marriage is celebrated, forfeits $1,000, half to the use of the state and half to the use of any person who may sue therefor (9004).

d. Form of Ceremony.—[No general provision.] Marriage may be solemnized by the pastor of any religious society according to the

rules or custom of such society (8996). Mennonists or Quakers, or any other Christian society having similar rules, may solemnize marriage according to their forms by consent of the parties, published and declared before the congregation assembled for public worship (8997).

e. Common Law Marriage.—No statutory provision. *A marriage good at common law is good in Alabama without observance of statutory provisions (1, 4, 8, 12, 27, 28, 29, 30), regardless of what the parties consider the legal effect of their relations to be (31, 32). A contract* per verba de praesenti, *to constitute a valid marriage, must be consummated by cohabitation as man and wife (2, 3, 4, 29, 30, 31, 32, 33, 34). A marriage* per verba de futuro cum copula [*validity never directly decided—G.M.*] *requires that the copula be evidence of acceleration of the espousals: cohabitation must be a fulfilment of the marriage agreement (35).*

Where the parties are ceremonially married and cohabit as man and wife when one of them has a spouse living, their cohabitation after the death of such spouse and their knowledge of the death warrant the inference of a new matrimonial understanding between them, and they are husband and wife from the time of the removal of the impediment (36), or a common law marriage may be inferred from the continued cohabitation (37). But where the parties separate after some cohabitation following removal of the impediment and one of them marries again, no marriage is established (38).

f. Irregular Solemnization.—No provision.

g. Other Provisions.—*Penalties.* Any person solemnizing marriage knowing that either party is under the age of legal consent or within the degrees prohibited by law must be fined not less than $1,000 (4943). [See 4945 under 3a.] Any authorized officiant knowingly marrying persons, one white and one Negro or descendant of a Negro, must be fined from $100 to $1,000 and may also be imprisoned not more than six months (5002). [See 5001 under 4b.] [Note: Judges, justices of the peace, and licensed ministers are entitled to $2.00 for celebrating marriage (9005). But §7285 allows the judge of probate only $1.50 for celebrating marriage.]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—All persons or religious societies solemnizing marriage in virtue of a license or according to their peculiar

forms must certify the fact in writing to the judge of probate within one month thereafter, stating the names of the parties and the time and place of celebration (9001). *Penalty.* Any officiant, or any clerk or keeper of the minutes of any religious society, failing to return a certificate of marriage to the judge of probate as required, is guilty of a misdemeanor (4944). [As to penalty for misdemeanor see 1j.] [Note: The judge of probate shall give notice to the solicitor of all offenses under this chapter on penal statutes concerning marriage (4945).]

b. Local Record.—The certificate returned by the officiant to the judge of probate must be recorded in the book kept for the registry of licenses (9001). The clerk or keeper of the minutes of each society celebrating marriage according to its rules must enter in a register a particular account of all marriages solemnized (8996). *Penalty.* See 4942 under 1j.

c. State Record.—Within the first five days of each month the judge of probate of each county shall forward to the State Board of Health, on blanks supplied by said board, reports of all marriages in the county for the preceding month (1153).

d. Evidence.—A certified copy of the marriage certificate filed with the judge of probate is presumptive evidence of the fact of marriage (9001). The register of the religious society celebrating marriages according to its rules, or a sworn copy, is presumptive evidence of the fact (8996). *A certified copy of a marriage license and certificate is admissible as evidence (9, 39). But the record is only a circumstance and not conclusive proof of the facts stated (40). The judge's certificate need not be under seal (8). Official records of other states must be authenticated according to the act of Congress (41, 42, 43, 44) or the laws of Alabama (45, 46) in order to be admissible, and that when such records are required by the laws of the other state (41).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (8991). *Though the relationship must exist at the time of the act of incest, the death of the wife does not terminate the relationship by affinity with her blood relatives where issue of the intermarriage are living (47). Penalty.* Persons knowingly intermarrying within the degrees within which marriages are by law incestuous and void must each be imprisoned for from one to seven years (4522). [Note: §8991, which is referred

to, declares marriage within the prohibited degrees to be incestuous but does not say "void."] [As to penalty for knowingly solemnizing an incestuous marriage, see 2g.]

b. Proper Civil and Racial Status.—The legislature shall never pass any law authorizing or legalizing marriage between any white person and a Negro or descendant of a Negro (Const. §102). *Penalty.* Any white person and any Negro or descendant of a Negro who intermarry must each be imprisoned not less than two nor more than seven years (5001, as amended G.L. 1927, ch. 214). [As to penalty for issuing license for or celebrating such marriage, see 5002 under 1k and 2g.] *To constitute the crime one party must be pure white (48). The prohibition of such interracial marriage is not unconstitutional or discriminatory though imposing a greater penalty for adultery between persons of different races than between those of the same race (49, 50, 51, 52). Interracial marriages are void, confer no property rights (53), and give rise to prosecution for fornication (54, 55, 56).*

c. Proper Legal Status.—Any person having a former spouse living who marries or cohabits with another in this state must be imprisoned from two to five years (3440), unless such person, prior to the second marriage, had procured a decree dissolving the former marriage and allowing remarriage, or at the time of the second marriage did not know the former spouse to be living, such spouse having remained absent for the last five years preceding (3441). *As a person already married is incapable of marrying again (57), such attempted bigamous marriage is void ab initio (37, 58, 59) and does not affect the prior marriage (60). A voidable marriage being a marriage in fact, until it is avoided a subsequent marriage would be bigamous (8, 9). Absence of a spouse and belief in his death are no excuse for remarriage during his actual life unless confirmed by five years' absence (61). The spouse continuing at the residence deserted by the party marrying again is not "absent" within the meaning of the statute (62).*

Neither of the parties to a divorce shall marry again, except to each other, until sixty days after decree rendered, or if appeal is taken within sixty days, during the pendency of said appeal (7425). *The privilege of remarriage does not exist during the period of sixty days and any marriage within that time is bigamous (63). The marriage of a person divorced by a decree not allowing him the privilege of remarriage is felonious and unquestionably void (64, 65). So also the marriage of a person who has been a party to a foreign divorce within six months after the decree which was inoperative on its face until expiration of six months (43). Though leave to remarry is entirely*

within the chancellor's discretion (66), he may not suspend operation of a decree for divorce or annulment until costs are paid (30, 60). Prohibition of remarriage has no extraterritorial effect [*see* 6].

d. Proper Consent of Parties.—*A duly solemnized marriage is complete without consummation (67). There must in some cases, as of ignorant Negroes, be something to prove that the affair was seriously entered into as a contract of marriage (68). An equity court has inherent power to annul a marriage procured by fraud (69). Marriage to prevent testimony at a seduction prosecution with intent not to assume full marital obligations (70), or false representations that a license has been procured and that the officiant is a minister (28), or overpersuasion to marry without parental consent are not such frauds as make a marriage invalid (13). But misrepresentation of name, age, and character, and fraudulent procurement of a marriage license may affect essentially the consent of a young and mentally undeveloped person and allow of annulment before cohabitation (69). A marriage voidable for fraud may be ratified by cohabitation (28). Only the party deceived may set up the invalidity, the other being estopped to take advantage of his own fraud (28).*

A marriage may be annulled for duress if induced by actual threats and not by mere fear of bodily harm (71). But a marriage induced merely by fear of prosecution for bastardy is not void (72, 73), though it may be declared so if not consummated and if the person arrested is actually innocent (3). [*In the case cited there was other cause for nullity.—G.M.*] *Penalty.* Any person unlawfully taking any woman against her will and compelling or having intent to compel her to marry him or any other person must be imprisoned not less than five years (3184).

5. STATE SUPERVISION

The blank forms on which the judge of probate shall make monthly report of marriages in the county to the State Board of Health are supplied by such board (1153). *Penalty.* Any person knowingly violating any rule of the State Board of Health shall be fined from $5.00 to $100 and, if the violation continue, each day's violation shall constitute a separate offense punishable accordingly (4375).

6. INTERSTATE RELATIONS

A marriage valid where contracted, as between Indians in Indian territory, is valid in Alabama (74). A prohibition of remarriage in a

foreign divorce decree has no extraterritorial effect upon the party who later contracts a valid marriage as a resident of Alabama (75, 76, 77). And conversely a prohibition in an Alabama decree does not affect a marriage validly contracted elsewhere (59).

ALABAMA CASES

1. Campbell's Adm'r v. Gullatt, 43 A. 57 (1869). **2.** Ashley v. State, 109 A. 48 (1895). **3.** Hawkins v. Hawkins, 142 A. 571 (1904). **4.** Herd v. Herd, 194 A. 613 (1915). **5.** Crook, Judge v. Webb, 125 A. 457 (1899). **6.** Wood v. Farnell, 50 A. 546 (1874). **7.** Ely v. Gammel, 52 A. 584 (1875). **8.** Beggs v. State, 55 A. 108 (1876). **9.** Garner v. State, 9 App. 60 (1913). **10.** Owen v. Coffey, 201 A. 531 (1918). **11.** Cooley v. State, 55 A. 162 (1876). **12.** White v. Hill, 176 A. 480 (1912). **13.** Smith v. Smith, 205 A. 502 (1921). **14.** Cotten v. Rutledge, 33 A. 110 (1858). **15.** Fitzsimmons v. Buckley, 59 A. 539 (1877). **16.** Willis v. Byrne, Adm'r, 106 A. 425 (1894). **17.** Riley v. Bell, 89 A. 597 (1889). **18.** Bell v. Wallace, 81 A. 422 (1886). **19.** Blann v. Beal, 5 A. 357 (1843). **20.** Roberts v. Pippen, 75 A. 103 (1883).

21. Fulghum v. Roberts, 75 A. 341 (1883). **22.** Brooks v. Governor, 17 A. 806 (1850). **23.** Jeffreys v. Malone, 105 A. 489 (1894). **24.** Rawdon v. Rawdon, 28 A. 565 (1856). **25.** Smith v. Smith, 141 A. 590 (1904). **26.** Price v. Price, 142 A. 631 (1904). **27.** State v. Murphy, 6 A. 765 (1844). **28.** Farley v. Farley, 94 A. 501 (1891). **29.** Martin v. State, 19 App. 251 (1923). **30.** Mickle v. State, 21 So. 66 (1896). **31.** Tartt v. Negus, 127 A. 301 (1899). **32.** McClurkin v. McClurkin, 206 A. 513 (1921). **33.** Williams v. State, 54 A. 131 (1875). **34.** Moore v. Heineke, 119 A. 627 (1898). **35.** Robertson v. State, 42 A. 509 (1868). **36.** Prince v. Edwards, 175 A. 532 (1912). **37.** Woodword Iron Co. v. Bradford, 206 A. 447 (1921). **38.** McLaughlin v. McLaughlin, 201 A. 482 (1918). **39.** Eldridge v. State, 126 A. 63 (1899). **40.** Woods v. Moten, 129 A. 228 (1900).

41. Martin's Heirs v. Martin, 22 A. 86 (1853). **42.** Reid v. State, 168 A. 118 (1910). **43.** Witt v. State, 5 App. 137 (1912). **44.** Bohannon v. State, 18 App. 365 (1922). **45.** Hawes v. State, 88 A. 37 (1889). **46.** Darrow v. Darrow, 201 A. 477 (1918). **47.** Tagert v. State, 143 A. 88 (1904). **48.** Rollins v. State, 18 App. 354 (1922). **49.** Ellis v. State, 42 A. 525 (1868). **50.** Ford v. State, 53 A. 150 (1875). **51.** Green v. State, 58 A. 190 (1877). **52.** Pace and Cox v. State, 69 A. 231 (1881). **53.** Locklayer v. Locklayer, 139 A. 354

(1903). **54.** Hoover v. State, 59 A. 57 (1877). **55.** Green v. State, 59 A. 68 (1877). **56.** Linton v. State, 88 A. 216 (1889). **57.** Ex parte Young, 211 A. 508 (1924). **58.** McCaig v. State, 16 App. 581 (1918). **59.** Boyles v. Wallace, 208 A. 213 (1922). **60.** Hines v. Hines, 203 A. 633 (1920).

61. Jones v. State, 67 A. 84 (1880). **62.** Parker v. State, 77 A. 47 (1884). **63.** Ex parte State ex rel. Attorney General, 210 A. 9 (1923); reversing Vance v. State, 19 App. 352 (1923). **64.** Barfield v. Barfield, 139 A. 290 (1903). **65.** Evans v. Evans, 200 A. 329 (1917). **66.** Ex parte Edwards, 183 A. 659 (1913). **67.** Potier and McCoy v. Barclay, 15 A. 439 (1849). **68.** Brown v. State, 52 A. 338 (1875). **69.** Raia v. Raia, 214 A. 391 (1926). **70.** Johnson v. Johnson, 176 A. 449 (1912). **71.** Kelley v. Kelley, 206 A. 334 (1921). **72.** Williams v. State, 44 A. 24 (1870). **73.** Bostick v. State, 1 App. 255 (1911). **74.** Wall v. Williamson, 8 A. 48 (1845); Wall v. Williams, 11 A. 826 (1847). **75.** Reed v. Hudson, 13 A. 570 (1848). **76.** Fuller's Adm'r v. Fuller, 40 A. 301 (1866). **77.** Wilson v. Holt, 83 A. 528 (1887).

ARIZONA

REFERENCES: Revised Statutes of Arizona, 1913 (Civil Code, Penal Code); Session Laws of Arizona, 1912 (regular and special sessions), 1913 (2d and 3d special sessions), 1915 (regular and two special sessions), 1917, 1918 (special session), 1919, 1920 (special session), 1921, 1922 (special session), 1923, 1925, 1927; Reports through Volume 27.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to the sections of the various codes in Revised Statutes and to session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Arizona section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—No persons shall be joined in marriage until a license shall have been obtained for that purpose (C.C. 3833), and no marriage contracted within this state shall be valid unless a license be issued as provided (C.C. 3844).

b. Issuer.—License is obtained from the clerk of the superior court of the county in which one of the parties resides or in which the marriage is to take place (C.C. 3833) or from the bonded superintendent or agent of an Indian school or agency, the clerk of the superior court in the county in which the school or agency is located issuing such licenses in blank as shall be requisitioned by the superintendents (S.L. 1915, ch. 21, §1), and any justice of the peace whose office is more than 20 miles from the county seat of his county may receive applications for licenses within the county of his residence on blanks provided by the clerk of the superior court and transmit such applications immediately to the clerk, who upon receipt thereof, accompanied by the necessary fee, may forward to the applicants the license applied for (C.C. 3834, as amended S.L. 1922, ch. 34).

c. Compensation of Issuer.—For each marriage license and return the clerk of the superior court shall receive $2.00 (C.C. 3197, as

amended S.L. 1915, ch. 41, §2) which he shall pay monthly to the county treasurer (C.C. 3193, 3218), the clerks receiving salaries (S.L. 1917, ch. 61, as amended by S.L. 1919, ch. 162, and S.L. 1921, chs. 19 and 120) which are full compensation for all services rendered (C.C. 3244). *Penalty.* Failure of the clerk to pay over the fees collected is embezzlement (C.C. 3221). [Note: The clerk of the superior court issuing licenses in blank to the superintendent of an Indian school or agency shall charge the same against such superintendent and credit his account with the amounts remitted resulting from the sale of the licenses or from the return of those not issued. The superintendent shall remit to the clerk immediately upon license issuance the regular fee, failure being punishable by imprisonment of not more than six months, fine of from $50 to $300, or both (S.L. 1915, ch. 21, §§1, 2).]

d. Personal Appearance by Candidates.—Any person desirous of marrying shall apply to the clerk of the superior court for license to marry and shall be required by him to take and subscribe to an oath (C.C. 3834, as amended S.L. 1922, ch. 34). [As to application before justices of the peace, see 3834 under 1b.]

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—[No statutory provision as specific condition to license issuance. See 1k.] Males under eighteen and females under sixteen years shall not marry, except in cases of pregnancy where the prospective parent is under such age the parties may marry—unless prohibited by the statute relating to miscegenation—with the consent of the parent or guardian of the one under age and with the approval of the judge of the superior court of any county (C.C. 3832, as amended S.L. 1919, ch. 18).

g. Parental Consent.—No clerk shall issue a license without the consent of the parents—if both are living that of the father alone sufficing and, when separated, that of the one having custody—or guardians, unless the male applicant be twenty-one and the female eighteen years (C.C. 3835). *Penalty.* Any clerk issuing a marriage license to a male under twenty-one or a female under eighteen years without such consent shall be punished by fine of from $10 to $100, imprisonment not exceeding sixty days, or both (C.C. 3842). *Penalty.* See Pen. C. 166 under 1k. [As to penalty for solemnizing marriage without parental consent, see C.C. 3841 under 2g.]

h. Mental and Physical Qualifications.—[No statutory provision as condition to license issuance.] A divorce may be granted in favor

of the husband when the wife at the time of marriage shall have been pregnant by a man other than the husband without his knowledge at the time of marriage (C.C. 3859).

i. Form of License.—The license is directed to the persons authorized by law to solemnize marriage (C.C. 3834, as amended S.L. 1922, ch. 34).

j. Record of License.—The clerk shall record all licenses issued by him (3836). The oath required of the applicants shall be filed by the clerk as part of the record (3834, as amended S.L. 1922, ch. 34). *Penalty.* See Pen. C. 166 under 1k.

k. Other Provisions.—Persons desirous of marrying shall be required by the clerk to take and subscribe to an oath that they will certify truly as to their names, ages, residences, race, and relationship (3834, as amended S.L. 1922, ch. 34). *Penalty.* Every wilful omission to perform any duty enjoined by law upon any public officer is punishable as a misdemeanor (Pen. C. 166), by imprisonment not exceeding six months, fine not exceeding $300, or both (Pen. C. 19).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by all regularly licensed or ordained clergymen, judges of courts of record, and justices of the peace (C.C. 3830), and by every bonded superintendent of an Indian school or agency (S.L. 1915, ch. 21, §1). Licensed or ordained clergymen shall include all ministers, elders, or other persons who are authorized by the regulations of any religious society to solemnize marriages (C.C. 3831).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—The marriage license shall be sufficient authority for authorized persons to solemnize the marriage (C.C. 3834, as amended S.L. 1922, ch. 34). *Penalty.* Every authorized officiant who solemnizes marriage without first being presented with a license as required is guilty of a misdemeanor (Pen. C. 362), punishable by imprisonment not exceeding six months, fine not exceeding $300, or both (Pen. C. 19).

d. Form of Ceremony.—Every marriage ceremony must be performed in the presence of the officiant and at least two other witnesses of lawful age, and a certificate thereof must be signed by at least two such witnesses (C.C. 3843).

e. Common Law Marriage.—The common law rule that a marriage may be contracted by agreement of the parties without marriage ceremony is hereby abrogated and no marriage contracted within this state shall be valid unless license be issued as provided and a marriage solemnized by an officiant or by someone purporting to act as such (C.C. 3844). [See 2f.] [This statute was enacted in 1913.—G.M.]

f. Irregular Solemnization.—A marriage to be valid must be solemnized by an authorized officiant or by someone purporting to act as such and believed in good faith by at least one of the parties to be such (C.C. 3844).

g. Other Provisions.—*Penalty.* Any authorized officiant knowingly taking part in or sanctioning by his presence or by the issuance of a certificate the marriage of a male under twenty-one or of a female under eighteen years without consent in writing of the parent or guardian shall be punished by a fine of from $50 to $300, imprisonment of not more than six months, or both (C.C. 3841).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant shall indorse the marriage upon the license and make return to the office of the clerk of the superior court within twenty days after the solemnization (C.C. 3836). *Penalties.* An officiant failing to make the returns required shall be punished by fine of from $10 to $100, imprisonment not exceeding sixty days, or both (C.C. 3842). Every authorized officiant failing for more than thirty days to file the license and certificate or wilfully making a false return to the clerk is guilty of a misdemeanor (Pen. C. 362), punishable by imprisonment not exceeding six months, fine not exceeding $300, or both (Pen. C. 19). [There is an obvious inconsistency between C.C. 3842 and Pen. C. 362.—G.M.]

b. Local Record.—Returns made by the officiant shall be recorded by the clerk of the superior court (C.C. 3836). *Penalties.* [See Pen. C. 166 under 1k.] Every person wilfully making a false record of any marriage return is guilty of a misdemeanor (Pen. C. 362), punishable by imprisonment not exceeding six months, fine not exceeding $300, or both (Pen. C. 19).

c. State Record.—No provision.

d. Evidence.—Any certificate of marriage executed in accordance with the laws of this state, the record thereof or a duly certified copy

of such record, shall be prima facie evidence in any proceeding of the facts therein stated (C.C. 1761). *A certified and properly authenticated copy of a record of marriage in Mexico is admissible in a bigamy prosecution* (*1*). Evidence of the admission of the fact of marriage by the party against whom the proceeding is instituted or of general repute or cohabitation as married persons or any other circumstantial evidence from which the fact of marriage may be inferred shall be competent in proof of marriage (C.C. 1762). Upon trial for bigamy either marriage may be proved by such evidence as is admissible to prove a marriage in other cases without the register, certificate, or other record evidence (Pen. C. 1047).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Such marriages are incestuous and absolutely void (C.C. 3838). *Penalty.* Persons marrying within the prohibited degrees are punishable by imprisonment not exceeding ten years (Pen. C. 279).

b. Proper Civil and Racial Status.—Marriages of persons of Caucasian blood or their descendants with Negroes, Mongolians, or Indians, and their descendants, shall be null and void (C.C. 3837). *The marriage of a white person and an Indian in Arizona is of no effect* (*2*). *The statute forbidding miscegenation is constitutional* (*3*). *Under it can a person of mixed Caucasian blood marry any possible person other than a Malay* (*3*)? *Penalty.* Every person living in a state of open and notorious cohabitation is guilty of a misdemeanor (Pen. C. 241), punishable by imprisonment not exceeding six months, fine not exceeding $300, or both (Pen. C. 19). [Inasmuch as these interracial marriages are void, cohabitation thereunder would be punishable under the foregoing penalty.—G.M.]

c. Proper Legal Status.—Every person having a spouse living who marries any other person (Pen. C. 275) is punishable by fine not exceeding $2000 and by imprisonment not exceeding ten years (Pen. C. 277), except where the spouse by such former marriage has been absent for five successive years without being known to such person within that time to be living, or where such former marriage has been annulled, pronounced void, or dissolved (Pen. C. 276). *It is immaterial that the person remarrying did not know the spouse to be living* (*4*). After the dissolution of marriage either party may marry again only after one year has elapsed from the divorce judgment or after decision upon appeal being taken within one year (C.C. 3864,

as amended S.L. 1917, ch. 54). *This prohibition has no extraterritorial effect (5). Upon later marriage—but at no earlier time (6)—there arises a prima facie presumption that a prior marriage has been dissolved (7).*

d. Proper Consent of Parties.—A divorce may be granted when prior to the marriage either party shall have been convicted of a felony without the knowledge thereof by the other party at the time of marriage (C.C. 3859). [See 3859 under 1h.] *Penalty.* Every person taking a woman unlawfully against her will and compelling her to marry him or any other person is punishable by imprisonment of from two to fourteen years (Pen. C. 235).

5. STATE SUPERVISION

No provision.

6. INTERSTATE RELATIONS

All marriages valid where contracted are valid in this state, except that marriages solemnized elsewhere by parties intending at the time to reside in this state shall have the same legal effect as if solemnized here, and parties residing in this state cannot evade its laws by going elsewhere for the solemnization of the marriage (C.C. 3839). *A marriage within the forbidden period after divorce, validly contracted elsewhere by domiciliaries of this state in evasion of the law thereof, is valid here because such prohibition does not impose nullity on the marriage or incapacity on the parties, and does not provide a penalty or declare public policy (5).*

7. SEX OFFENSES AND MARRIAGE

Punishment for seduction of an unmarried female under eighteen is barred by the marriage of the parties before trial or by the accused's offer in good faith to marry and its rejection (Pen. C. 239).

ARIZONA CASES

1. Ford v. State, 21 A. 567 (1920). **2.** Estate of Walker, 5 A. 70 (1896). **3.** Kirby v. Kirby, 24 A. 9 (1922). **4.** U. S. v. Tenney, Same v. Christofferson, Same v. Kemp, 2 A. 29 (1885); rehearing, 2 A. 127. **5.** Horton v. Horton, 22 A. 490 (1921). **6.** Pendleton v. Brown, 25 A. 604 (1923). **7.** McCord v. McCord, 13 A. 377 (1911).

ARKANSAS

REFERENCES: Digest of the Statutes of Arkansas (Crawford and Moses), 1921; Acts of Arkansas, 1921, 1923, 1923 (special session), 1924 (special session), 1925, 1927; Reports through Volume 171.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to the sections in the Crawford and Moses Digest or to the session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Arkansas section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—All persons contracting marriage in this state are required first to obtain a license (7057).

b. Issuer.—Persons are required to obtain a license from the clerk of the county court of some county in this state (7057), and such clerks are required to furnish the license (7058). [Note: The county clerk is clerk of the county court (1392). The clerks of the circuit court in counties having a population less than 15,000 shall be ex-officio clerks of the county and probate courts and recorder (1363). Though clerks of probate courts may issue marriage licenses in counties having two judicial districts (A. 1901, p. 194), this provision is of no significance because the clerk of the county court is ex-officio clerk of the probate court (1391).]

c. Compensation of Issuer.—Clerks of the county courts shall be allowed $1.25 for issuing each marriage license (4576). [§7058, allowing clerks $1.00 for marriage license issuance, was enacted in 1875 just prior to §4576 and is superseded by it.—G.M.] Excess of total receipts above $5000, after deducting the amount for approved expenses, shall be paid into the county treasury (4639). [Note: The clerks collect from the applicant an additional registration fee of 50 cents, which is turned into the State Treasury for the maintenance of the Bureau of Vital Statistics (5151c).] The annual salary of the county clerk in counties having over 75,000 population [Pulaski County only—G.M.] shall be $5000, and fees for all such services shall be paid into the county general fund (A. 1925, No. 67, §1b).

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—[No provision as condition to license issuance.] Every male of seventeen and female of fourteen years shall be capable in law of contracting marriage; under those ages marriages are void (7037). When either party is incapable of consent from want of age, the marriage shall be void on declaration of nullity by a court of competent jurisdiction (7041). *The marriage of a female of fourteen is valid (1, 2). The marriage of a male under the age of consent is binding unless annulled by a proper court, and a later marriage without annulment is bigamous (3).*

g. Parental Consent.—Any applicant for license to marry may introduce the parent or guardian of himself or of the other party, or the parent's or guardian's duly attested certificate, to prove to the satisfaction of the clerk that the parties are of lawful age—twenty-one years in males and eighteen in females (4986); and if the parties are not of lawful age the clerk before issuing the license shall require of the applicant satisfactory evidence of the consent, either oral or written, of the parent or guardian. If the clerk is in doubt as to the evidence of consent or the true age of the parties, he may require the parties to make affidavit of the genuineness of consent or correctness of the ages given, which affidavit shall be filed in his office for public inspection (7062). *Penalty.* See 7065 under 1k. *Such affidavit required by the clerk according to statute is material to the securing of a license, and false swearing therein is perjury punishable by imprisonment of from one to fifteen years (4). Formerly when the officiant had to require parental consent for the marriage of minors, the consent had to be given personally or in writing, not by a third person (5), and the officiant accepted the parties' statement of their ages at his peril (6).*

h. Mental and Physical Qualifications.—[No statutory provision as condition to license issuance.] When either party is incapable of consent from want of understanding, or is incapable from physical cause of entering the marriage state, the marriage shall be void on declaration of nullity by a court of competent jurisdiction (7041). [*As to concealment of communicable syphilis and misrepresentation of pregnancy, see* 4d.]

i. Form of License.—The license, addressed to any authorized officiant, commands the solemnization of the marriage of the parties whose names and ages appear, and the return to the parties of the

license and appended certificate signed by the officiant in his official capacity (7060). The forms of license shall be in accordance with §7060, and shall contain a part to be detached and forwarded to the State Registrar of Vital Statistics by the clerks of county and probate courts (5151b).

j. Record of License.—[No general provision.] Affidavits of genuineness of parental consent and correctness of given ages shall be filed by the clerk (7062). [It is assumed that the bond required by §7061, cited under 1k, must be recorded, and as such bond is required for each marriage license, there is in effect a record.—G.M.] [Note: Clerks of probate [county] courts in counties having two judicial districts shall keep a record of marriage licenses at the county site of each district (7059).]

k. Other Provisions.—Clerks of the county courts, being fully assured that applicants are lawfully entitled, are required to furnish licenses upon application, on receipt of their fee (7058). Any applicant for a license shall enter into bond to the state, signed by at least one person besides the applicant, in the penal sum of $100, for the use of the common school fund of the county, conditioned that the parties have a lawful right to the license and will faithfully comply with its provisions, which bond shall be void when the license is returned to the county clerk duly executed and officially signed by some legally authorized officiant (7061). Any person obtaining a license shall return the same to the clerk of the county court within sixty days; if not, the required bond shall remain in force (7063). *Penalties.* Any county clerk issuing a license contrary to this act, or to persons by law not entitled thereto, shall be fined from $100 to $500 (7065). Any person applying for and obtaining a license to marry another without first obtaining the consent of such party shall be fined from $10 to $100, and shall be liable to the party injured in any sum adjudged by a court or jury for damages (7064).

2. SOLEMNIZATION

a. Officiant.—For the purpose of being registered and perpetuating the evidence thereof, marriage shall be solemnized only by the Governor, any judge of a court of record, any justice of the peace of the county where the marriage is solemnized, any regularly ordained minister or priest (7046), or by religious societies which reject formal ceremonies according to their rites (7051). *A notary public is not authorized to solemnize marriages* (7). [Note: All marriages hereto-

fore [1881] solemnized by ministers, duly accredited and acting as such, are binding (7069; 7074). So too if heretofore [1885] solemnized by a justice of the peace out of his county (7070; 7071). So too if heretofore [1911] solemnized by mayors in the state (7072; 7073).]

b. Officiant's Credentials.—No minister or priest shall be authorized to solemnize marriage until he shall have recorded in the office of the clerk and recorder of some county his license or credentials of his clerical character and shall have obtained from such clerk a certificate, under seal, that the same is duly recorded; and such minister shall add to the certificate of marriage a statement giving the county where and time when his credentials were so recorded (7047). [Note: Marriages solemnized before March 10, 1891, by a regularly ordained minister are valid, though such minister may not have caused his credentials to be recorded as required (7048).] *Penalty.* See 7049 under 2g. *Neglect to file credentials being a misdemeanor, a minister is presumed to have recorded them before solemnizing a marriage* (*8*). The clerk and recorder in each county shall seasonably record all licenses or credentials of clerical character deposited with him for record (7053). *Penalty.* Any clerk failing to comply with the preceding section shall be fined not exceeding $100 (7054). [Note: The book of clerical credentials is evidence in all courts (7055).]

c. Presentation of License.—[No specific provision. But inasmuch as §7060 requires the officiant to endorse his certificate upon the license and §7066 imposes a penalty for his failure to do so, these sections, cited under 3a, indirectly require the presentation of license.—G.M.] *Solemnizing a marriage without presentation of a license is a punishable violation of the statute subjecting to fine any person presuming to solemnize a marriage contrary to this chapter* (*7*). [This statute, §7066, is cited under 2g.]

d. Form of Ceremony.—Marriage ceremonies solemnized by a minister or priest shall be according to the forms of the church to which he belongs; those solemnized by a civil officer according to such form as the officer shall deem appropriate (7050). Religious societies rejecting formal ceremonies may join in marriage members of such societies according to their rites (7051).

e. Common Law Marriage.—No statutory provision. *Common law marriages have never been recognized in Arkansas and are contrary to our system of marriage laws* (*9, 10*). *But a common law marriage valid*

where contracted is valid in Arkansas (11, 12, 13, 14). And where valid, proof of cohabitation after an agreement to be husband and wife is sufficient to constitute a binding contract of marriage (12). Not so, however, where the parties "just took up together" (15). Where relations were illicit in origin mere continuance of cohabitation without proof of an agreement after removal of the impediment raises no presumption of a legal marriage (16).

f. Irregular Solemnization.—*Penalty.* See 7049 and 7066 under 2g. *A notary public, presuming to solemnize a marriage knowing himself not to be authorized, is guilty of the offense of solemnizing a marriage contrary to this chapter (7).*

g. Other Provisions.—*Penalties.* Whoever shall knowingly solemnize a marriage within the prohibited degrees of relationship shall be guilty of a misdemeanor (7045), punishable by imprisonment not exceeding one year, fine not exceeding $250, or both (3245). Any minister, priest, or person purporting himself to be such, solemnizing marriage contrary to this chapter shall be fined not less than $100 (7049). Any person presuming to solemnize marriage contrary to this chapter, or failing officially to sign and return any license to the party at the time of marriage, shall be fined from $100 to $500 (7066).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The person solemnizing the marriage shall indorse on the license his certificate of such fact (7060), adding thereto a statement giving the county where and time when his credentials were recorded (7047). The clerk or keeper of the minutes or the moderator or person presiding in a society solemnizing marriage according to its rites shall make out the marriage certificate (7052). Any person obtaining license under this chapter shall return the same to the clerk of the county court within sixty days; and if the license be duly executed and officially signed by some authorized officiant the bond required by §7065 [7061] shall be null and void; otherwise it shall remain in effect (7063). [For requirements and conditions of bond, see 7061 under 1k.] Upon return of any license officially signed, the clerk issuing the same shall make a record thereof, and immediately shall make out and attach to the license a certificate of such record, signed officially and sealed, and shall return the same to the party presenting it (7067). *Penalties.* Any person failing officially to sign and return any license to the party at the time of marriage shall be fined from $100 to $500 (7066). Any

authorized officiant wilfully making a false return of any marriage or pretended marriage shall be fined not less than $100 (7068). [Note: If a marriage record is lost the officiant must make out a new certificate of the facts, which may be recorded (8347).]

b. Local Record.—Upon return of any license officially signed, the issuing clerk shall record the same in the marriage record in his office (7067; 8625). *Penalty.* Any clerk and recorder wilfully making a false record of any return of a marriage shall be fined not less than $100 (7068). [Note: Clerks shall designate upon the record of all marriages the race of the parties if other than Caucasian or white (A. 1921, No. 179, §1). Violation shall be punished by fine of $25 for each offense (§3).]

c. State Record.—County and probate clerks each month shall forward to the State Registrar of Vital Statistics the detachable form appended to the license containing the facts set forth therein (5151d). All marriages within the state shall be registered with the State Registrar of Vital Statistics at the state capitol (5151a). *Penalty.* See 5152 under 5.

d. Evidence.—The books of marriages kept by clerks and recorders and certified copies thereof are evidence in all courts (7055). *The local marriage record, including a copy of the marriage license (17), is proper proof of marriage even in a bigamy prosecution (18). A foreign record of a license and certificate is admissible to prove a marriage (19) and, if there is other proof, need not be certified so completely as is required by the federal statute for introduction of official records of other states (20). Evidence of the officiant as to solemnization is admissible though his authority is not proved by a document and he did not sign the marriage certificate (21).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Such marriages are incestuous and absolutely void (7038). *A marriage of first cousins is absolutely void (22).* Persons marrying within the degrees of consanguinity within which marriages are by law incestuous or void absolutely shall be guilty of incest (2628). *Penalties.* Persons contracting marriage in fact contrary to the prohibitions of §7038, or persons knowingly solemnizing the same, shall be guilty of a misdemeanor (7045), punishable by imprisonment not exceeding one year, fine not exceeding $250, or both (3245). Persons convicted of incest shall be imprisoned from three to ten years (2629). *Though the pro-*

vision making void the marriage of first cousins was enacted after the statute making criminal all incestuous marriages, it is within the penalty, and such marriages are criminal (23, 24).

b. Proper Civil and Racial Status.—Marriages of white persons with Negroes or mulattoes are illegal and void (7039). *Penalty.* Concubinage between persons of the Caucasian and Negro races is a felony, punishable by imprisonment of from one month to one year (2601). [Such interracial marriages being void, the parties are presumably cohabiting in concubinage and subject to the above penalty.—G.M.] *The statute prohibiting interracial marriages is constitutional (25).*

c. Proper Legal Status.—No subsequent marriage shall be contracted by any person during the lifetime of a former spouse unless the marriage has been dissolved for one of the causes set forth in the law concerning divorce (7042). Prior subsisting marriage is ground for divorce (3500). *The marriage of a person already married is an absolute nullity (18, 26).* If any husband shall abandon his wife, or wife her husband, and reside outside this state for five successive years without being known to such person to be living during that time, death shall be presumed, and any subsequent marriage after the end of said five years shall be as valid as if such spouse were dead (7044). *But less than five years' absence from the state does not validate a later marriage (26).* Every person having a spouse living who shall marry any other person shall be guilty of bigamy (2606). *The offense is complete upon the second marriage without subsequent cohabitation (27) and notwithstanding a reasonable belief in one's legal ability to marry (28).* The last section shall not extend to any person whose spouse shall have been absent for five successive years without being known to such person within that time to be living, or shall have been absent from the United States for five years, or to any person whose former marriage has been dissolved, pronounced void, or annulled because contracted within the age of legal consent (2607). *Penalty.* Persons convicted of bigamy shall be imprisoned from three to seven years (2609).

The presumption in favor of the validity of marriage (29) puts upon the person attacking it the burden of showing that it has been annulled or dissolved (17), that no proper divorce had dissolved a prior impeding marriage (14), or that a prior spouse was living less than five years preceding (30).

d. Proper Consent of Parties.—Marriage is considered in law a civil contract, to which the consent of parties capable in law of con-

tracting is necessary (7036). *At common law a marriage was absolutely void for want of legal consent (31).* [As to application for marriage license without the consent of the other party, see 7064 under 1k.] When the consent of either party is obtained by force or fraud the marriage is void from the time that it is so declared by a competent court (7041). *Misrepresentation of pregnancy is not fraud allowing of annulment except possibly where the child's paternity is falsely stated, for the man in having relations with the woman assumes a known risk (32). Even were concealment of premaritally existing syphilis fraud sufficient for annulment, continued cohabitation with knowledge thereof by the innocent spouse condones the fraud and ratifies the marriage (33).* *Penalty.* Every person who shall unlawfully and against her will take any woman and compel her to marry him, or any other person, shall suffer death (2326). [Note: Taking a woman unlawfully with intent to compel her marriage is punishable by fine of not less than $500 and imprisonment not less than one year (2327).] *A marriage obtained by duress is void and prosecution for seduction may continue (34), but courts are loath to ascribe duress as the motive for marriage where there is an existing "moral" duty to marry, and refuse annulment in case the man married to procure dismissal of a seduction prosecution—if there was probable cause therefor, even though there could have been no conviction (35)—or where there are threats without actual bodily harm (36).*

5. STATE SUPERVISION

The State Registrar of Vital Statistics shall prescribe the detachable form appended to the license and containing the facts set forth therein (5151d). *Penalty.* Persons violating any rule of the State Board of Health relative to recording information for the Bureau of Vital Statistics, or furnishing false information, shall be fined from $5.00 to $100, imprisoned not exceeding sixty days, or both (5152).

6. INTERSTATE RELATIONS

All marriages contracted without this state which would be valid by the law of the state or country in which the same are consummated and in which the parties then actually resided, shall be valid in this state (7043). *A marriage valid where contracted is valid in Arkansas (12, 14), so long as it does not contravene Arkansas policy (11).*

7. SEX OFFENSES AND MARRIAGE

Though marriage of the accused with the woman alleged to have been seduced shall not be a defense in seduction prosecutions (2416),

the prosecution is suspended upon the marriage and continues only upon abandonment without legal cause (2415). *Though prosecution may be suspended, not so judgment already entered (37). A marriage to avoid prosecution is nevertheless valid (38). A mere proposal to marry after seduction prosecution is begun is no defense (38, 39, 40, 41) or a proposal made before prosecution and refused (42).*

ARKANSAS CASES

1. Bruce v. Arrington, 22 A. 362 (1860). **2.** Barnett v. State, 35 A. 501 (1880). **3.** Walls v. State, 32 A. 565 (1877). **4.** Cox v. State, 164 A. 126 (1924). **5.** Smyth v. State, 13 A. 696 (1853). **6.** Sikes v. State, 30 A. 496 (1875). **7.** Pearce v. State, 97 A. 5 (1910). **8.** State v. Willis, 9 A. 196 (1848). **9.** Furth v. Furth, 97 A. 272 (1911). **10.** Farmer v. Towers, 106 A. 123 (1913). **11.** Jones v. Jones, Adm'r., 28 A. 19 (1872). **12.** Darling v. Dent, 82 A. 76 (1907). **13.** Evatt v. Miller, 114 A. 84 (1914). **14.** Estes v. Merrill, 121 A. 361 (1915). **15.** Flanagin v. State, 25 A. 92 (1867). **16.** O'Neill v. Davis, 88 A. 196 (1908). **17.** Royal v. Mosaic Templars of America, 143 A. 596 (1920). **18.** Halbrook v. State, 34 A. 511 (1879). **19.** McGaugh v. Mathis, 131 A. 221 (1917). **20.** McNeill v. State, 117 A. 8 (1915). **21.** Tanner v. State 116 A. 452 (1915).

22. Johnson v. State, 60 A. 308 (1895). **23.** State v. Fritts, 48 A. 66 (1886). **24.** Nations v. State, 64 A. 467 (1897). **25.** Dodson v. State, 61 A. 57 (1895). **26.** Goset v. Goset, 112 A. 47 (1914). **27.** Scoggins v. State, 32 A. 205 (1877). **28.** Russell v. State, 66 A. 185 (1899). **29.** Brotherhood of Railroad Trainmen v. Merideth, 146 A. 140 (1920). **30.** Cash v. Cash, 67 A. 278 (1899). **31.** Rose v. Rose, 9 A. 507 (1849). **32.** Mason v. Mason, 164 A. 59 (1924). **33.** Koehler v. Koehler, 137 A. 302 (1919). **34.** Lind v. State, 137 A. 92 (1918). **35.** Marvin v. Marvin, 52 A. 425 (1889). **36.** Honnett v. Honnett, 33 A. 156 (1878). **37.** Morphis v. State, 113 A. 438 (1914). **38.** Jacobs v. Jacobs, 146 A. 45 (1920). **39.** Carrens v. State, 77 A. 16 (1905). **40.** Lasater v. State, 77 A. 468 (1906). **41.** Cook v. State, 102 A. 363 (1912). **42.** Bollin v. State, 127 A. 271 (1917).

CALIFORNIA

REFERENCES: Deering's Codes of California (four volumes), 1923: Civil Code, Penal Code, Political Code, Code of Civil Procedure; General Laws of California (two volumes), 1923; Supplement to the Codes and General Laws, 1925; Constitution of California, 1923; Statutes of California, 1927; Reports through Volume 199 California and 74 Appellate.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the various Codes, of the General Laws, or of the supplement thereto, and to the session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this California section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—All persons about to be joined in marriage must first obtain a license therefor (C.C. 69, as amended St. 1927, ch. 687). *Before 1863 there was no requirement as to marriage license (1), and since 1895, though a solemnization is necessary to validity, it is debatable whether failure to obtain a license will nullify a marriage otherwise legally solemnized (2).* When unmarried persons, not minors, have been living together as man and wife, they may be married without a license by any clergyman (C.C. 79). Marriage must be licensed as provided in this article, but non-compliance by others than a party to a marriage does not invalidate it (C.C. 68). [Note: Members of a religious denomination solemnizing marriage according to its peculiar mode must comply with requirements as to license (C.C. 79a). Such is the interpretation of the Code Commissioner.—G.M.]

b. Issuer.—License is obtained from the county clerk of the county in which the marriage is to be celebrated (C.C. 69, as amended St. 1927, ch. 687).

c. Compensation of Issuer.—A fee of $2.00, which the county clerk shall charge and collect, shall be full compensation for services

of the clerk and recorder in issuing a marriage license and recording the certificate (Pol. C. 4300a). All salaried county officers shall pay into the county treasury each month all fees collected, except where such fees are allowed such officers (Pol. C. 4292). [Note: Pol. C. ch. X, §§4230 ff. contains separate provisions fixing the salaries of county clerks in each of the 58 classes of counties. The salaries are considerably amended by Statutes, 1925 and 1927. Except where officers in some counties are allowed to retain a few fees unrelated to marriage, all fees would seem to be paid over to the county treasury, and in no case would a percentage of the fee for issuing a marriage license seem to be a perquisite for the clerk.—G.M.]

d. Personal Appearance by Candidates.—Application for a marriage license must be made by the parties to the marriage, and upon such application the clerk shall have the parties record notice of intention to marry in a book. If necessary in order to satisfy himself as to the facts mentioned in this section, the clerk, at the time license is applied for, may examine the applicants on oath (C.C. 69, as amended St. 1927, ch. 687).

e. Advance Notice and Objections.—Application for license must be made by the parties at least three days and not more than thirty days before issuance, and the clerk shall issue the license only within such period after application (C.C. 69, as amended St. 1927, ch. 687).

f. Minimum Age.—[No specific provision as condition to license issuance.] Any male minor over eighteen and any female minor over sixteen years is capable, with parental consent, of consenting to and consummating marriage (C.C. 56). [As to annulment, see C.C. 82, 83 under 1g.] *Marriage below the age of consent is voidable only and may be ratified by cohabitation after attaining such age (1, 3). Inasmuch as our statute fixes no actual minimum, an otherwise legal marriage of a minor under the age of consent may not be even voidable if contracted with parental consent (4). Even though the promise is not legal, a boy under the age of consent may be liable for seduction under promise of marriage (5).*

g. Parental Consent.—Males between eighteen and twenty-one years and females between sixteen and eighteen are capable of consenting to marriage if the written consent of the parents, parent, or guardian of such person under age is filed by the clerk issuing the license (C.C. 56), and no license shall be issued to persons within such ages, not previously married, unless such written consent is presented to the county clerk, duly verified, which consent must be filed by the

clerk and such facts stated in the license (C.C. 69, as amended St. 1927, ch. 687). *Penalty.* See Pen. C. 176 under 1k. [As to oath, see C.C. 69 under 1k.] [Note: Though all persons below twenty-one years are minors, upon lawful marriage between the ages of eighteen and twenty-one a female shall be deemed an adult (C.C. 25, as amended St. 1927, ch. 661).]

A marriage without parental consent may be annulled by a party thereto who was under the age of legal consent, upon action by the parent or guardian when the minor is under such age or by the minor within four years after attaining it, unless after attaining this age such party freely cohabited with the other as husband or wife (C.C. 82, 83). *A marriage over the age of consent is valid independent of parental consent (6, 7, 8) and, conversely, an unconfirmed marriage contracted below such age without parental consent is voidable (9) upon action by the party under age though not by the one over age (8). Although the officiant at a marriage of a person under the age of consent may be punishable, the marriage itself is not void or even voidable if ratified after attaining such age (1).*

h. Mental and Physical Qualifications.—No license must be granted when either of the applicants is imbecile or insane, or is at the time of application under the influence of intoxicating liquor or narcotic drug (C.C. 69, as amended St. 1927, ch. 687). *Penalty.* See Pen. C. 176 under 1k. [As to oath see C.C. 69 under 1k.] Where either party was of unsound mind at the time of marriage, the marriage may be annulled by the party injured or by a relative or guardian of the party of unsound mind at any time before the death of either party, unless after return to reason the parties freely cohabit as husband and wife (C.C. 82, 83). *The mental derangement allowing of annulment must be such as to render the party incapable of understanding the nature of the obligations imposed by the marriage contract (10), the trial court's finding as to which will not be disturbed upon appeal (10, 11). Although it has been held that the decree of annulment of a marriage of an insane person does not itself render the marriage void but simply declares it to have been void ab initio (12), the code provides that the marriage of a person of unsound mind and not entirely without understanding is binding until decree of annulment (13), pronounced upon action of the injured party, or of the guardian before the death of either party, and is not subject to collateral attack (14, 15).*

The procreation of children through marriage being the main purpose thereof, concealed pregnancy by another man at the time of marriage may be ground for annulment by the husband (16, 17), at least if the husband himself was guilty of no antenuptial intercourse with the wife (18, 19).

But misrepresented unchastity alone does not allow of annulment (20, 21). [*See* 4d.]

i. Form of License.—The license must show the identity of the parties, their names, residence, and ages, and whether white, Mongolian, Negro, or mulatto. The notice of intention to marry also states the parties' places of birth (C.C. 69, as amended St. 1927, ch. 687). [As to oath, see C.C. 69 under 1k; as to stating parental consent in the license, see C.C. 69 under 1g.]

j. Record of License.—No provision. [As to record of notice of intention to marry, see C.C. 69 under 1d. As to clerk's filing of parental consent to marriage of a minor, see C.C. 69 under 1g.]

k. Other Provisions.—No license must be issued authorizing the marriage of a white person with a Negro, mulatto, or Mongolian (C.C. 69, as amended St. 1927, ch. 687). Persons about to be joined in marriage must obtain from the county clerk in addition to the license a certificate of registry, which shall be filled out in his presence, stating the race, color, age, name (including maiden name of female if previously married), birthplace, residence, occupation, and domestic condition of each party; number of the marriage; and names (including maiden name of mother) and birthplaces of the parents of each (C.C. 69a). If necessary in order to satisfy himself as to the facts mentioned in this section, the clerk may examine the male applicant on oath, which examination shall be reduced to writing (C.C. 69). *An applicant making affidavit that his intended wife is aged nineteen when he knows her to be seventeen is guilty of perjury (22). Penalty.* Every wilful omission to perform any duty enjoined by law upon any public officer is punishable as a misdemeanor (Pen. C. 176), by imprisonment not exceeding six months, fine not exceeding $500, or both (Pen. C. 19).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by justices of the supreme court and district courts of appeal, judges of superior, municipal, and police courts, justices of the peace, city recorders, by priests or ministers of any denomination (C.C. 70, as amended 1925), and by particular religious denominations according to their peculiar mode (C.C. 79a). *Marriage may not be solemnized by an alderman in California and thus presumably not in New York in absence of proof of such authority (23), or by a sea captain aboard a ship subject to California law (24).*

b. Officiant's Credentials.—No provision.

c. Presentation of License.—The person solemnizing marriage must first require the presentation of a license (C.C. 72). *Penalty.* For solemnizing marriage without presentation of license the officiant is punishable by fine of from $100 to $1000, imprisonment of from three months to one year, or both (Pen. C. 359, 360). [Note: The certificate of registry also shall be presented to the officiant (C.C. 69a).]

d. Form of Ceremony.—No particular form is required, but the parties must declare in the presence of the officiant that they take each other as husband and wife (C.C. 71). [Note: The marriage certificate states the names of one or more witnesses to the ceremony (C.C. 73).] No contract of marriage, if otherwise duly made, shall be invalidated for want of conformity to the requirement of any religious sect (Const. Art. XX, §7). The provisions of this chapter relating to the solemnizing of marriage are not applicable to members of denominations having any peculiar mode of entering the marriage relation; but such marriages must be declared, acknowledged, and recorded as provided in §§76 and 77 [cited under 2e] (C.C. 79a).

e. Common Law Marriage.—Consent alone will not constitute marriage; it must be followed by a solemnization authorized by this code (C.C. 55). *Because of this code provision common law marriages contracted in California since March, 1895 are not valid (2, 24, 25, 26) and, where the only ceremony is a nullity, cohabitation and repute do not establish a marriage (25). But the requirement for solemnization was not retroactive (27). Between 1872 and 1895 marriage could be contracted by consent followed by solemnization or "by a mutual assumption of marital rights, duties, or obligations" (28, 29), which meant consummation by cohabitation between the parties publicly as husband and wife and not mere secret relations as are usual between a man and his mistress (3, 27, 30, 31, 32, 33, 34, 35). A common law marriage could then be established by marital cohabitation and repute (36), which elements, it has been held [incorrectly?—G.M.] were necessary in addition to the code requisites to constitute a valid non-ceremonial marriage (37). Though delay in assumption of marital rights and duties after interchange of consent might show a non-concurrence of the elements necessary to a marriage (29), not so where the assumption was intended as a consummation of the actual contract of marriage (38). Prior to the Code of 1872 marriage was merely a civil contract (39), established by a bona fide contract* per verba de praesenti *or* per verba de futuro cum copula *(40, 41) and evidenced by cohabitation, conduct, and repute as*

husband and wife (41, 42, 43). Cohabitation and repute did not constitute marriage, but raised merely a prima facie presumption thereof (44, 45, 46), rebuttable by evidence showing that there was in fact no marriage (47, 48, 49, 50) or that there was a later actual marriage (51).

If no record of the solemnization of a marriage heretofore contracted be known to exist, the parties may join in a written declaration, subscribed by them and attested by at least three witnesses, showing: their names, ages, and residences; the fact of marriage; the fact that no record thereof is known to exist (C.C. 76). Declarations of marriage must be acknowledged and recorded in like manner as grants of real property (C.C. 77).

Where the only ceremony of marriage is void because of an existing impediment, matrimonial cohabitation and repute after removal of the disability do not establish a marriage (25). Possibly this was not so before 1895 when common law marriages were recognized (52).

f. Irregular Solemnization.—Non-compliance with provisions as to entry into marriage by others than a party to a marriage does not invalidate it (C.C. 68).

g. Other Provisions.—The officiant must satisfy himself of the correctness of the license's statement of facts, and for that purpose may administer oaths and examine the parties and witnesses (C.C. 72). *Penalty.* Every authorized officiant knowingly solemnizing any incestuous or other marriage forbidden by law is punishable by fine of from $100 to $1000, imprisonment of from three months to one year, or both (Pen. C. 359). [*Note: A justice of the peace provided with a salary as sole compensation must pay into the county treasury fees paid him for solemnizing marriages (53).*]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant must sign and indorse upon or attach to the license a certificate showing: the fact, time, and place of solemnization; the names and residence of one or more witnesses; the official position of the officiant, or his denomination if a minister (C.C. 73). The officiant must make a certified copy of the license and certificate at the request of either party, and must file the originals with the county recorder within thirty days after the marriage (C.C. 74). Officiants within three days shall file with the county recorder a certificate of registry of the marriage (Pol. C. 3076). [C.C. 69a contains a similar requirement. As to contents of certificate of registry see C.C. 69a under 1k.] Where a marriage is

declared as provided in §76 [see 2e], the husband within thirty days thereafter must file the declaration with the county recorder, who must record the same (C.C. 79a). *Penalty.* For failure to make and file such declaration the husband is liable to the same penalties as an officiant failing to make return (C.C. 79a).

Penalties. Failure to perform a duty imposed by this chapter on registry shall be a misdemeanor (Pol. C. 3082), punishable by imprisonment not exceeding six months, fine not exceeding $500, or both (Pen. C. 19). An officiant wilfully making false return of any marriage or pretended marriage, or failing for more than thirty days after solemnizing a marriage to file the license and certificate, is punishable by fine of from $100 to $1000, imprisonment of from three months to one year, or both (Pen. C. 359, 360).

b. Local Record.—The county recorder shall be the sole local registrar for marriages performed anywhere in the county (G.L., Act 9008, §4). He shall receive each certificate of registry of marriage and make a copy thereof to be permanently preserved in his office as the local record, in such manner as directed by the state registrar (Pol. C. 3078). *Penalties.* [See Pol. C. 3082 under 3a.] Every person wilfully making a false record of any marriage return is punishable by fine of from $100 to $1000, imprisonment of from three months to one year, or both (Pen. C. 359, 360).

When unmarried persons, not minors, who have been living together as man and wife, are married without a license, the clergyman must make and deliver to the parties a certificate of such marriage, and record the same upon the church records; no other record need be made (C.C. 79). Declarations of marriage [see C.C. 76 under 2e] must be acknowledged and recorded in like manner as grants of real property (C.C. 77).

c. State Record.—The State Registrar of Vital Statistics shall have charge of the registration of marriages under the direction of the State Board of Health (G.L., Act 9008, §2). Recorders each month shall transmit the original certificates of marriage filed with them to the state registrar, who shall have the same filed and systematically indexed (Pol. C. 3078). *Penalties.* [See Pol. C. 3082 under 3a.] Any person failing to furnish correctly any information, furnishing false information affecting any record, or falsifying any record, or a local registrar failing to perform his required duties, shall for the first offense be fined not less than $5.00, and for each subsequent offense be fined not less than $50 or imprisoned not more than sixty days or both (G.L., Act 9008, §22). [Note: If a marriage has not

been registered, one beneficially interested may petition the superior court, which having established the fact may order a record made (G.L., Act 9008, §21).]

d. Evidence.—Consent to and consummation of marriage may be proved under the same general rules of evidence as facts are proved in other cases (C.C. 57). A recorded certificate of marriage, or certified copy, proves the marriage in prosecutions for adultery (C.C. 269b). Evidence of marriage in non-support prosecutions shall be the same as in civil actions (C.C. 270e). *A marriage may be proved not only by the marriage certificate (54) but by evidence of cohabitation and repute (3, 41, 44, 45, 56). A copy of a foreign record of a license and certificate is admissible only if certified (23) and the signature and authority of the officiant established (57).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Such marriages are incestuous and void from the beginning (C.C. 59). *Penalty.* Intermarriage within the degrees of consanguinity within which marriages are declared by law incestuous and void is punishable by imprisonment of from one to fifty years (Pen. C. 285). [Note: As to penalty on officiant for knowingly solemnizing such marriages, see Pen. C. 359 under 2g.]

b. Proper Civil and Racial Status.—Marriages of white persons with Negroes, Mongolians, or mulattoes are illegal and void (C.C. 60). [As to prohibition of license issuance, see C.C. 69 under 1k.] [There is no specific penalty for such marriages and none to be implied from the nullity of the marriage, for cohabitation of unmarried persons seems not to be a crime in California.—G.M.] *Though such interracial marriages are forbidden by the laws of California (58, 59), the prohibition has no extraterritorial effect upon marriages valid where contracted (58, 60).*

c. Proper Legal Status.—A subsequent marriage contracted during the life of a former spouse is illegal and void from the beginning (C.C. 61), and may be annulled by either party during the other's life or by the former spouse (C.C. 82, 83). *A later marriage contracted during the subsistence of an earlier is unlawful (27) and void (39, 61, 62), cannot create the relation of husband and wife (63, 64), and does not dissolve the prior marriage (65). Though such a marriage is void even if contracted in a bona fide belief that a prior marriage has been*

dissolved, it may allow of a division of property acquired thereunder (66), and a representation of marriage may estop the parties to deny the relation in suit by a third person (67). The later marriage may be declared null in a proper action (52, 68) brought at any time by the lawful spouse or by the other party to the illegal marriage (1, 61). To constitute bigamy the prior marriage must be valid (3, 23) and the spouse thereby must be living at the time of the second marriage (69). Penalty. Bigamy is punishable by fine not exceeding $5000 and imprisonment not exceeding ten years (Pen. C. 283).

A subsequent marriage contracted during the life of a former spouse is valid until its nullity is adjudged, if such former spouse has been absent and not known to the person remarrying to be living for the five preceding years, or is generally reputed and believed by such person to be dead (C.C. 61). *A subsequent marriage is valid until annulled if contracted after five years' proper absence of a spouse (70, 71), which means that the absent spouse must be the one deserting (72) and not the one who remarries (27).* Bigamy does not extend to any person remarrying whose former spouse has been absent for five successive years without being known to such person within that time to be living (Pen. C. 282). *Five years' absence is a matter of defense to a bigamy prosecution and need not be alleged in the indictment (73). It is no defense to bigamy that the one remarrying honestly believes the absentee to be dead (74) or no first marriage to exist (55).*

A subsequent marriage contracted during the life of a former spouse is illegal and void from the beginning unless the former marriage has been annulled or dissolved, but remarriage of either party during the life of the other is not valid if contracted within one year after entry of an interlocutory decree of divorce (C.C. 61). One year after interlocutory judgment, or later upon determination of an appeal, the court may enter final judgment of divorce which shall permit either party to remarry thereafter, but such entry shall not validate the marriage of either contracted theretofore or constitute a defense to a criminal prosecution (C.C. 132). Bigamy does not extend to a person whose former marriage has been pronounced void, annulled, or dissolved by a competent court (Pen. C. 282). *In absence of a statute the court has no authority to impose a restraint upon remarriage after divorce (75). A statute, such as formerly existed in California, prohibiting remarriage for a period after divorce, makes void a marriage contracted within California within the period (25) but has no extraterritorial effect upon marriages contracted elsewhere (76, 77, 78), though such foreign marriage, based on illegal consideration even if valid, might not make binding an antenuptial contract (79). Since 1903 the provision as to interlocutory decree has been in effect, and a final decree*

must be granted at the end of a year if there is no appeal (80), regardless of the court's desire to extend the period (81).

d. Proper Consent of Parties.—Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of contracting is necessary (C.C. 55). When the consent of either party was obtained by fraud or force, the marriage may be annulled, if there was afterwards no free cohabitation as husband and wife (C.C. 82), on suit of the injured party (C.C. 83). *Penalty.* False personation of another, and marriage in such assumed character, with or without the connivance of such other, is a felony (Pen. C. 528), punishable by imprisonment of from six months (Pen. C. 18a) to five years (Pen. C. 18).

A marriage may be annulled for fraud going to the essence of the contract, such as a secret, preconceived determination not to allow matrimonial intercourse, if persisted in after marriage (82), or concealed pregnancy by another at the time of marriage, because it makes procreation by the husband impossible and gives to a strange child claims upon the husband (16, 17). Where the cause of pregnancy alone is misrepresented, the husband himself having had premarital intercourse with the wife, there her incontinence should put him on guard (18, 19). But mere concealed unchastity is not sufficient fraud (21), the maxim caveat emptor *applying (20). Marriage may be annulled for duress (83) which is the inducing cause of the marriage, when it so overcomes the will as to render the consent apparent only and not real (84). Penalty.* Every person who takes any woman unlawfully, against her will, and compels her to marry him or any other person is punishable by imprisonment of from two to fourteen years (Pen. C. 265). *Mere remaining together ostensibly as husband and wife does not establish cohabitation between the parties and constitute ratification (82).*

5. STATE SUPERVISION

The State Registrar of Vital Statistics shall prepare forms and blanks under the direction of the State Board of Health with instructions for record of marriages, and shall procure the faithful registration of the same. The said board shall be charged with enforcement of the law on Vital Statistics and shall promulgate any additional regulations (G.L., Act 9008, §2). The state registrar shall prepare and distribute exclusively all forms and blanks for use in registry and in otherwise carrying out this act, shall issue detailed instructions as may be required to procure its uniform observance and maintain a perfect system of registration, shall examine the certificates returned,

and may require additional information of clergymen, judges, and others having knowledge of the facts, who are required to supply such data (G.L., Act 9008, §18). The State Registrar has supervisory power over local registrars, who report violations to him, and may investigate such cases and report them to the prosecuting attorney of the county for court proceedings; and the Attorney General shall assist in the enforcement (G.L., Act 9008, §23). [Similar, though less complete, provisions appear in Pol. C. 3074, 3080, and 3081.] The clerk of each city and incorporated town having at least 5,000 inhabitants shall be the local registrar provided, however, that in cities and counties and cities having a freeholder's charter, the health officer shall act as local registrar (G.L., Act 9008, §4). *A local officer of a city acting as a local registrar for the state is subject to the duties imposed upon him by the state, the offices being distinct, and is not accountable to the city for fees received in acting as a state official (85).*

6. INTERSTATE RELATIONS

Marriages valid where contracted are valid in this state (C.C. 63). *Except in cases of polygamy and incest the validity of a marriage is tested by the law of the place of contract (60), and if valid there is valid everywhere (78), even where prohibited by the law of the forum (58, 79) or the law of the parties' domicil (76), and even though contracted elsewhere in evasion of the law of the domicil (77). But persons may not go where no law at all exists and there contract a marriage in violation of the law of their domicil (24).*

7. SEX OFFENSES AND MARRIAGE

Intermarriage of the parties subsequent to the commission of the offense and prior to the finding of an indictment bars prosecution for seduction (Pen. C. 269). *An actual marriage must be proved (32); mere willingness of the man to marry does not bar prosecution, and the woman need not condone the offense (86).*

CALIFORNIA CASES

1. Hunter v. Milam, 5 Unrep. 107 (1895). **2.** Estate of Shipp, 168 C. 640 (1914). **3.** People v. Beevers, 99 C. 286 (1893). **4.** People v. Souleotes, 26 App. 309 (1915). **5.** People v. Kehoe, 123 C. 224 (1898). **6.** Matter of Guardianship of Ambrose, 170 C. 160 (1915). **7.** Johnson v. Alexander, 39 App. 177 (1918). **8.** Campbell v. Campbell, 248 Pac. 762 (1926). **9.** West v. West, 62 App. 541

(1923). **10.** Dunphy v. Dunphy, 161 C. 380 (1911). **11.** Williams v. Williams, 63 App. 482 (1923). **12.** In re Eichhoff, 101 C. 600 (1894). **13.** Dunphy v. Dunphy, 161 C. 87 (1911). **14.** Estate of Gregorson, 160 C. 21 (1911). **15.** Wolf v. Gall, 32 App. 286 (1916). **16.** Baker v. Baker, 13 C. 87 (1859). **17.** Hardesty v. Hardesty, 193 C. 330 (1924). **18.** Franke v. Franke, 3 Unrep. 656 (1892). **19.** Gondouin v. Gondouin, 14 App. 285 (1910). **20.** Barnes v. Barnes, 110 C. 418 (1895).

21. Wilcox v. Wilcox, 171 C. 770 (1916). **22.** People v. Torterice, 66 App. 115 (1924). **23.** People v. Spitzer, 57 App. 593 (1922). **24.** Norman v. Norman, 121 C. 620 (1898). **25.** Estate of Elliott, 165 C. 339 (1913). **26.** Macchi v. La Rocca, 54 App. 98 (1921). **27.** Estate of Richards, 133 C. 524 (1901). **28.** Toon v. Huberty, 104 C. 260 (1894). **29.** Estate of Blythe, 4 Coff. Prob. 162 (1890). **30.** Sharon v. Sharon, 75 C. 1 (1888); 79 C. 633 (1889); see also Sharon v. Hill, 26 Fed. 337 (1885). **31.** Kilburn v. Kilburn, 89 C. 46 (1891). **32.** People v. Lehmann, 104 C. 631 (1894). **33.** Hinckley v. Ayres, 105 C. 357 (1895). **34.** Harron v. Harron, 128 C. 308 (1900). **35.** Quackenbush v. Swortfiguer, 136 C. 149 (1902). **36.** Wells v. Allen, 38 App. 586 (1918). **37.** Estate of Baldwin, 162 C. 471 (1912). **38.** In re Ruffino, 116 C. 304 (1897). **39.** Graham v. Bennet, 2 C. 503 (1852). **40.** Estate of McCausland, 2 Unrep. 11 (1876); 52 C. 568 (1878).

41. White v. White, 82 C. 427 (1890). **42.** Estate of Titcomb, Myr. Prob. 55 (1873). **43.** Estate of Whalen, 1 Coff. Prob. 202 (1885). **44.** Letters v. Cady, 10 C. 533 (1858). **45.** Kelly v. Murphy, 70 C. 560 (1886). **46.** Hite v. Hite, 6 Unrep. 216 (1898); 124 C. 389 (1899). **47.** Estate of Beverson, 47 C. 621 (1874); affirming Myr. Prob. 35 (1873). **48.** Estate of Howe, Myr. Prob. 100 (1876). **49.** Smith v. Smith, 163 C. 630 (1912). **50.** Parker v. Parker, 241 Pac. 581 (1925). **51.** Estate of Campbell, 12 App. 707 (1910). **52.** Poole v. Wilber, 95 C. 339 (1892). **53.** San Diego County v. Bryan, 18 App. 460 (1912). **54.** People v. Stokes, 71 C. 263 (1886). **55.** People v. Hartman, 130 C. 487 (1900). **56.** Landsrath v. Industrial Accident Comm., 247 Pac. 227 (1926). **57.** People v. Jordan, 237 Pac. 757 (1925). **58.** Estate of Mackay, 3 Coff. Prob. 318 (1894). **59.** Benson v. Benson, 176 C. 649 (1917). **60.** Pearson v. Pearson, 51 C. 120 (1875).

61. Stierlen v. Stierlen, 6 App. 420 (1907); 18 App. 609 (1912). **62.** Clendenning v. Parker, 69 App. 685 (1924). **63.** Estate of Delaporte, 6 Coff. Prob. 513 (1913). **64.** People v. Mock Yick Gar, 14 App. 334 (1910). **65.** Estate of Newman, 124 C. 688 (1899). **66.**

Schneider v. Schneider, 183 C. 335 (1920). **67.** Gerlach v. Turner, 89 C. 446 (1891). **68.** Uhl v. Uhl, 52 C. 250 (1877). **69.** Ex parte Baker, 4 App. 25 (1906). **70.** Estate of Harrington, 140 C. 244 and 294 (1903). **71.** Estate of Perry, 58 App. 420 (1922). **72.** Jackson v. Jackson, 94 C. 446 (1892). **73.** People v. Priestley, 17 App. 171 (1911). **74.** People v. Brown, 74 C. 306 (1887). **75.** Barber v. Barber, 16 C. 378 (1860). **76.** Estate of Wood, 137 C. 129 (1902). **77.** Mohn v. Tingley, 191 C. 470 (1923). **78.** People v. Woodley, 22 App. 674 (1913). **79.** Estate of Wood, 137 C. 148 (1902). **80.** Newell v. Superior Court, 27 App. 343 (1915).

81. Mason v. Superior Court, 24 App. 386 (1914). **82.** Millar v. Millar, 175 C. 797 (1917). **83.** Linebaugh v. Linebaugh, 137 C. 26 (1902). **84.** Nicholson v. Nicholson, 174 C. 391 (1917). **85.** City of Sacramento v. Simmons, 66 App. 18 (1924). **86.** People v. Hough, 120 C. 538 (1898).

COLORADO

REFERENCES: Compiled Laws of Colorado, 1921; Session Laws of Colorado, 1922 (extraordinary session), 1923, 1925, 1927; Reports through Volume 79.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections in the Compiled Laws or to the session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Colorado section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—County clerks shall have authority to issue marriage licenses to any parties applying. Officiants receiving such licenses are authorized to solemnize marriage (5551). [*The marriage license requirement is directory only. See* 2e.]

b. Issuer.—The county clerk of any county shall have authority to issue marriage licenses (5551).

c. Compensation of Issuer.—The county clerk shall be entitled to receive of the applicant at the time of license issuance a fee of $1.00 for filing such license and recording certificate (5561). All fees collected by county officers shall be paid over to the county treasurer, and annual salaries of county clerks shall be paid from the general fund and not otherwise (7902), except in counties of the fifth class, where such salaries shall be paid from the fees of the office (7931).

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—No statutory provision. [As to common law ages of consent, see Introduction, page 9.]

g. Parental Consent.—No requirement as condition to license issuance. [As to requirement for officiant to obtain parental consent before solemnizing marriage of a minor, and penalty for failure to do so, see 5557 under 2g.]

h. Mental and Physical Qualifications.—No statutory provision.

i. Form of License.—The license contains the name and address of each party, the previous marriages, method of their dissolution, and if by divorce, the grounds therefor; and orders the officiant to return the certificate annexed (5551).

j. Record of License.—No provision. [As to record of affidavit, see 5553 under 1k.]

k. Other Provisions.—The county clerk shall propound to the applicant the questions contained in the form of license (5551). [See 1i.] The county clerk shall issue license if he has personal knowledge of the competency of the parties; otherwise he shall first take the affidavit in writing of the applicant or applicants, and of such other persons as he may see proper, such affidavits, if showing the parties legally competent, being his warrant against fine (5553). *Penalties.* Any county clerk issuing a license to parties not legally competent without taking such affidavit shall be fined $100 (5553). False swearing in such affidavit shall be perjury (5554), punishable by imprisonment from one to fourteen years (6776).

2. SOLEMNIZATION

a. Officiant.—The ceremony of marriage may be performed by any judge or justice of the peace, clergyman or licensed preacher (5555). [Note: All marriages solemnized in this state prior to 10 March, 1864, by any president or judge of any mining district, acting by the laws thereof, or by any justice of the peace or clergyman, are declared legal (5565).]

b. Officiant's Credentials.—No provision.

c. Presentation of License.—The license authorizes the officiant to solemnize the marriage (5551). An officiant to whom a duly issued license may come may solemnize marriage (5556). *Penalty.* Any minister or officer solemnizing marriage without presentation of license is punishable by fine of from $50 to $200 (5559).

d. Form of Ceremony.—No specific provision, but the certificate provides blanks for the signatures of two witnesses (5552).

e. Common Law Marriage.—No statutory provision. *A marriage contract made by competent parties, followed by matrimonial cohabitation, is valid though not contracted according to statutory provisions*

(1, 2). To establish a marriage contract there must be both matrimonial cohabitation and reputation (1, 2, 3, 4, 5, 6, 7, 8, 9)—something more than a euphemism for sexual relations (10, 11, 12). A contract of marriage alone without habit and repute establishes the marriage relation, and habit and repute alone without a marriage cannot create the marriage relation (13). Contracts of marriage per verba de futuro cum copula, *without evidence of a present contract, do not constitute marriage (14).*

A marriage contracted in good faith, though originally void because of a prior subsisting marriage of one of the parties, becomes valid by continued matrimonial cohabitation after removal of the impediment (15, 16), and possibly even where the innocent party learned of the impediment before its removal and the relation may have then become meretricious (17).

f. Irregular Solemnization.—No provision.

g. Other Provisions.—Any officiant not having personal knowledge of the incompetency of either party may lawfully solemnize marriage on receiving a duly issued license (5556). *Penalty.* Any minister or officer solemnizing marriage knowing either party to be legally incompetent is punishable by fine of from $50 to $200 (5559). No officiant shall knowingly join in marriage males under twenty-one or females under eighteen years without the consent of their parents or guardian; provided if there be none in this state, the officiant shall exercise his own judgment (5557). *Penalty.* Any person knowingly violating this section is punishable by fine not exceeding $500 (5557). [As to penalty on officiant for solemnizing incestuous or miscegenetic marriages, see 5549 under 4a.]

3. THE MARRIAGE RECORD.

a. Marriage Certificates.—The officiant within thirty days after solemnizing a marriage shall return the license and certificate, duly executed, to the issuing clerk (5552). *Penalty.* Neglect to make such return within the time required is punishable by fine of from $20 to $50 (5552). Every authorized officiant shall record all marriages solemnized and within three months shall transmit a certificate of every marriage to the clerk of the county in which it took place (5558). *Penalties.* Any person neglecting to make such return within the required time shall forfeit $100 for every offense (5558). Any authorized officiant wilfully making a false return is punishable by fine of not less than $100 or imprisonment for not less than three months (5563).

b. Local Record.—The clerk shall record all returns of marriages within one month after receiving the same (5560). Each county clerk shall file every license returned to him and record each certificate (5561). *Penalties.* Any recorder neglecting to record any return within the said time shall forfeit $100, to be recovered, with costs, by any person who will prosecute for the same (5560). Any clerk wilfully making a false record of any return of a marriage is punishable by fine of not less than $100 and imprisonment for not less than three months (5563).

c. State Record.—No provision. [Although by §939 boards of health shall report to the state board all marriages, births, and deaths, the inclusion of the word "marriages" was either an inadvertence or the provision has been superseded by §987 regulating the registry only of births and deaths.—G.M.]

d. Evidence.—The books of marriages kept by recorders shall be evidence in all courts (5562). In bigamy prosecutions the marriage need not be proved by record evidence but by such evidence as is admissible to prove marriages in other cases (6835).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Such marriages are incestuous and absolutely void; provided nothing in this section shall prevent persons living in that portion of the state acquired from Mexico from marrying according to Mexican custom (5548). [This section as amended in 1883 does not prohibit the marriage of first cousins. But for this distinction as to first cousins it is identical with §6838, which it may supersede.—G.M.] *Penalty.* Anyone knowingly contracting marriage contrary to the prohibitions in the preceding section, or anyone solemnizing such marriage, is punishable by fine of from $50 to $500, imprisonment of from three months to two years, or both (5549). [Note: For the same offense §6839 imposes a fine of from $100 to $500 or imprisonment of from six months to five years.]

b. Proper Civil and Racial Status.—Marriages between Negroes or mulattoes and white persons are absolutely void; provided nothing in this section shall prevent persons living in that portion of the state acquired from Mexico from marrying according to Mexican custom (5548). *Penalty.* See 5549 under 4a.

c. Proper Legal Status.—A prior undissolved marriage at the time of a later marriage is ground for divorce against the previously married spouse (5593). Any person marrying during the life of a former spouse is punishable by fine not exceeding $1000 and imprisonment not exceeding two years, unless the former spouse of such person shall have been continually absent for five years prior to the second marriage, and not known to such person to be living within that time, or unless such person is divorced or the former marriage declared void (6835). *The marriage of a person already married is originally void (15). Absence means being away from the place of established residence, and one remarrying before a spouse has been so absent for five years does so at his peril (18).* No decree of divorce shall be granted until the expiration of six months from the time when the findings of fact and conclusions of law were filed by the clerk of the court, but nothing in this act shall prevent either party to a divorce from remarrying at any time after the entry of the final decree (5604). *Remarriage before final decree may be reason to refuse a decree, and the second marriage is thus void (19). But not where the case comes up on writ of error and no supersedeas issued before the statutory period (20). The old statute prohibiting remarriage within one year, not having declared such second marriage void, had no extraterritorial effect (21, 22, 23).*

d. Proper Consent of Parties.—Marriage is considered in law a civil contract, to which the consent of the parties is essential (5547). *Penalties.* False impersonation of another and marriage or pretense of marriage in such assumed character, without the connivance of the other party, is punishable by imprisonment from one to ten years (6963 and 6965). Taking or detaining against her will any woman of any age with intent to marry her, or cause her to be married by any other person, is punishable by imprisonment from one to six years (6711).

5. STATE SUPERVISION

No provision.

6. INTERSTATE RELATIONS

Marriages valid where contracted shall be valid within this state; provided nothing in this section shall allow bigamy (5550). *Prohibitions of remarriage (as after divorce), unless declaring the forbidden marriage void, have no extraterritorial effect, and marriages validly contracted elsewhere in evasion of such statute are valid here (21, 22, 23, 24).*

7. SEX OFFENSES AND MARRIAGE

Intermarriage of parties before judgment upon indictment for seduction bars further prosecution (6841). Intermarriage of parties, if it can be legally solemnized, suspends prosecution for unlawful cohabitation (6837).

COLORADO CASES

1. Taylor v. Taylor, 10 App. 303 (1897). **2.** Klipfel's Estate v. Klipfel, 41 C. 40 (1907). **3.** Foster v. Berrier, 39 C. 398 (1907). **4.** Peery v. Peery, 27 App. 533 (1915). **5.** Estate of Matteote, 59 C. 566 (1915). **6.** Smith v. People, 64 C. 290 (1918). **7.** Brewer v. Brewer's Estate, 68 C. 84 (1920). **8.** Employer's Insurance Co. v. Morgulski, 69 C. 223 (1920). **9.** Cordas v. Ryan, 72 C. 521 (1923). **10.** Thimgan v. Mathews, 74 C. 93 (1923). **11.** Conter v. Smith, 74 C. 427 (1924). **12.** Foley v. Gavin, 76 C. 286 (1924). **13.** Peters v. Peters, 73 C. 271 (1923). **14.** Ryan v. Cordas [In re Danikas' Estate], 76 C. 191 (1924). **15.** Poole v. People, 24 C. 510 (1898). **16.** Mock v. Chaney, 36 C. 60 (1906). **17.** Smith v. People, 64 C. 290 (1918). **18.** Schell v. People, 65 C. 116 (1918). **19.** Branch v. Branch, 30 C. 499 (1903). **20.** Fowler v. Fowler, 63 C. 451 (1917). **21.** Griswold v. Griswold, 23 App. 365 (1913). **22.** Loth v. Loth's Estate, 54 C. 200 (1913). **23.** Crouse v. Wheeler, 62 C. 51 (1916). **24.** Bauer v. Abrahams, 73 C. 509 (1923).

CONNECTICUT

REFERENCES: General Statutes of Connecticut (three volumes), Revision of 1918; Public Acts of Connecticut, 1919, 1920 (special session), 1921, 1923, 1925, 1927; Reports through Volume 104.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the General Statutes and to Public Acts amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Connecticut section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—No persons shall be joined in marriage until both shall have joined in an application for a license (5263, as amended P.A. 1927, ch. 40). [As to requirement of license for marriage abroad of citizens of Connecticut, see 5264 under 6.]

b. Issuer.—Application for license shall be made to the registrar of births, marriages, and deaths in the town in which a marriage is to be celebrated (5263, as amended P.A. 1927, ch. 40), and such registrars shall give licenses according to law (324). [Note: Town clerks shall be ex-officio registrars of births, marriages, and deaths except where such registrars are elected or appointed under special laws (321).]

c. Compensation of Issuer.—Registrars shall be allowed a fee of 50 cents for issuing a license certificate and 50 cents for attaching affidavits to a marriage license, all other fees being paid by the town (2243). [There is no general statutory provision for a salary to be paid to the issuer either in his capacity as town clerk or registrar. But in most of the cities the charter or an ordinance provides for a compensation by salary in lieu of fees, which are paid into the city treasuries (e.g. Charter and Ordinances, Bridgeport, 1906, p. 133; New Haven, 1914, p. 97). Evidently in towns compensation is by fees.—G.M.]

d. Personal Appearance by Candidates.—Though both parties shall join in the application for a marriage license which shall be under

the oath of each of them, it is sufficient that the application be signed and sworn to by one of them when filed with the registrar if the other signs and swears to it before the registrar prior to the granting of the certificate (5263, as amended P.A. 1927, ch. 40).

e. Advance Notice and Objections.—The registrar shall not issue a certificate until the fifth day following application, unless the judge of probate for the district, after hearing the evidence, shall render a written decision that in his opinion public policy or the physical condition of either party requires celebration of marriage without delay. The registrar shall file such decision as a public document and immediately issue the certificate (5263, as amended P.A. 1927, ch. 40). *Penalty.* Any registrar issuing a certificate before the expiration of the required period shall be fined not more than $100 (5263, as amended P.A. 1927, ch. 40).

f. Minimum Age.—No certificate shall be issued to parties either of whom is less than sixteen years of age, unless the judge of probate of the district where such minor resides shall endorse thereon his written consent (5263, as amended P.A. 1927, ch. 40).

g. Parental Consent.—No certificate shall be issued, if either party is a minor—under twenty-one years (4861)—without written consent of the parent or guardian, or, if there be none resident in the United States, the consent of the judge of probate of the district where such minor resides, or if either party is under control of a guardian or conservator, without written consent of such guardian or conservator, and no one married without consent of the conservator shall acquire any rights in the property of a person under such guardianship at the time of marriage (5263, as amended P.A. 1927, ch. 40). *Penalty.* Any registrar knowingly issuing a certificate without the consent herein provided shall be fined not more than $100 (5263, as amended P.A. 1927, ch. 40). *The father of a minor daughter has an action against one procuring her to be enticed away and fraudulently married without the father's consent, whereby he suffered loss of services (1).*

h. Mental and Physical Qualifications.—[No provision as condition to license issuance.] *Penalty.* Intermarriage or cohabitation when either party is epileptic, imbecile, or feeble-minded, and the woman is under forty-five, is punishable by imprisonment for not more than three years (6428). *Marriage in violation of this act is not void (2), but may be declared so if the person had not understanding sufficient to comprehend the nature and consequences of the contract (3)*

or if he fraudulently concealed an epileptic condition and entered a marriage contract knowing that he was legally incapable of sexual relations, an essential element of the marriage status (2). It is in the public interest to prevent the propagation of epileptics (2). Penalty. Any person knowingly causing, advising, or assisting in procuring such marriage shall be fined not more than $1000, imprisoned not more than five years, or both (6429). [Note: Incurable insanity for five years preceding the bringing of the action is grounds for divorce (5280).] *Concealed or misrepresented antenuptial pregnancy does not make the marriage void ab initio (4) but is ground for divorce for fraudulent contract (5).* [See 4d.]

i. Form of License.—The certificate shall state that the parties named have complied with the provisions of this act, and shall be a license for any authorized officiant to join in marriage within the proper town the parties named (5263, as amended P.A. 1927, ch. 40).

j. Record of License.—No provision. [Note: The stub of the forms for record of vital statistics shall contain a printed form, which shall be filled out at the same time as the return, containing sufficient data to indicate clearly the essential features of the return (2376). *Penalty.* Violation of §2376 is punishable by fine of not more than $7.00 (2381).]

k. Other Provisions.—Both parties shall join in application for marriage license, stating under oath the name, age, color, occupation, birthplace, and residence of each, whether single, widowed, or divorced, and whether under the supervision or control of a guardian or conservator (5263, as amended P.A. 1927, ch. 40).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by all judges and justices of the peace, by ordained or licensed clergymen continuing in the ministry in this or any other state, and by any religious denomination according to its usages, and all marriages celebrated by other persons shall be void. No public official legally authorized to issue licenses shall solemnize marriage under authority of a license issued by himself, his assistant or deputy; nor shall any such assistant or deputy solemnize marriage under a license issued by such official (5267). *Penalty.* Any person violating any provision of this section shall be fined not more than $50 (5267). *Formerly marriage had to be celebrated by an ordained minister, which did not include deacons (6),*

settled in the work of the ministry, even though receiving no compensation (7), but marriages previously solemnized by ordained ministers not properly settled were validated by an act of 1820 (8). [The Attorney General has held, 19 August, 1927, that the present statute includes ministers engaged in the work of the church regardless of their being in charge of any parish or particular church.—G.M.]

b. Officiant's Credentials.—No provision.

c. Presentation of License.—The certificate shall be a license for any authorized officiant to join in marriage the parties named (5263, as amended P.A. 1927, ch. 40). *Penalty.* Any person solemnizing marriage without having received such certificate shall be fined not more than $100 (5263, as amended P.A. 1927, ch. 40).

d. Form of Ceremony.—Marriages solemnized according to the forms of any religious denomination in this state shall be valid (5267).

e. Common Law Marriage.—All marriages attempted to be celebrated by anyone other than an authorized officiant shall be void (5267).

f. Irregular Solemnization.—*Penalty.* Anyone undertaking to solemnize marriage knowing himself to be unauthorized shall be fined not more than $500, imprisoned not more than one year, or both (6431).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant shall certify upon the license certificate the fact, time, and place of marriage, and return it to the issuer before or during the first week of the succeeding month (5265). *Penalty.* For failure the officiant shall be fined not more than $10 (5265). [As to return of certificates of marriages of Connecticut citizens abroad, see 5264 under 6.]

b. Local Record.—Every registrar of vital statistics shall record a return within sixty days after it is made, and shall place it in a temporary binder (2377). Every registrar shall ascertain as accurately as possible and record all marriages occurring in his town (324), shall preserve and file the original certificates thereof (333), and shall keep alphabetical indices (328). [Note: Registrars shall complete their records of marriages from old public records and records of church societies (327).] If it appears from a marriage certificate that either party resided at the time of marriage in another town in this or any

other state, the registrar with whom such certificate is filed shall at once transmit a certified copy thereof to the registrar of such town or towns, who shall record the same (325). *Penalties.* Violation of §2377 is punishable by fine of not more than $7.00 (2381). Registrars knowingly making false entries of marriage records shall be fined not more than $50, imprisoned not more than three months, or both (327). Persons violating any provision of this chapter on vital statistics for which no specified penalty is provided shall be fined from $7.00 to $25 (338).

c. State Record.—Every registrar of births, marriages, and deaths shall send monthly to the Superintendent of Vital Statistics an attested copy of every certificate of marriage received, or a notification that no such certificate has been received (324). [Note: A registrar receiving a duplicate record of a marriage of residents of his town performed elsewhere shall not transmit a copy thereof to the Superintendent of Vital Statistics (325).] *Penalty.* See 338 under 3b. [As to supervision by the State Department of Health, see 2375 under 5.] [Note: Every person knowingly publishing a false or fictitious notice of any marriage shall be fined not more than $100 or imprisoned not more than six months (6211).]

d. Evidence.—The certificates required by §§5263, 5264, and 5265 shall be prima facie evidence of the facts therein stated (5266). [These sections are cited under 1e, 6, and 3a.] *The original certificate of marriage is admissible (9) without authentication (10, 11), and facts in the record of marriage may be shown (12) only when ascertained and recorded as an official duty (11, 13). A church marriage register is admissible (14).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Such marriages are prohibited and void (5262). *Though the marriage is void, alimony may be granted upon declaration of nullity (15). Penalty.* Every person marrying within the degrees specified in §5262 shall be imprisoned for not more than ten years (6381).

b. Proper Civil and Racial Status.—No provision.

c. Proper Legal Status.—*The marriage of a person already married is void (16), as is a promise to marry a person already married (3). Penalty.* Every person then lawfully married who shall marry another, or shall so marry in another state or county in violation of

its laws and shall knowingly cohabit thereafter in this state, shall be imprisoned not more than five years (6377, as amended P.A. 1921, ch. 389). Seven years' absence during all which period the absent party has not been heard from is ground for divorce (5280). The parties divorced may marry again after divorce (5281). *There is a presumption in favor of the legality of a marriage (17) which may be rebutted only by proof of illegality, such as lack of divorce from a prior marriage (11).*

d. Proper Consent of Parties.—Fraudulent contract of marriage is ground for divorce (5280). *The fraud sufficient for divorce has been declared to be limited to such elements as render a marriage void ab initio, want of age or reason, kinship, impotence, et cetera (4, 18), but more recently has been held to include elements which would defeat some essential purpose of the marriage relation, such as misrepresentations as to pregnancy being caused by the plaintiff (5) or as to freedom from epilepsy (2), at least where the party defrauded has been reasonably prudent (5). [Note: There is a legal wrong in securing a void marriage by fraud, which may give rise to a tort action (16).] Penalty.* Any person who takes or detains any female unlawfully, against her will with intent to compel her to marry him or any other person, shall be fined not more than $1000, or imprisoned for not more than fifteen years (6379).

5. STATE SUPERVISION

The State Department of Health shall have general supervision of the state system of marriage registration, shall prepare the necessary forms for obtaining and preserving marriage records, and shall insure the faithful registration of the same (2375). [Note: §§324 and 325 provide specific forms for registration which the state department shall supply.]

6. INTERSTATE RELATIONS

The marriage of a citizen of this state celebrated in a foreign country in conformity with its laws is valid provided such citizen could legally marry in this state, and provided such marriage shall, after 1 August, 1913, be celebrated in the presence of the United States ambassador or minister, or a consular officer, by an ordained or licensed clergyman, on presentation of a license certificate such as is required by the laws of this state, obtained from the registrar of births, marriages, and deaths of the town to which such citizen

belongs, such certificate operating as a license for the marriage. The laws of this state shall apply to such license certificate, except that return shall be made to the issuing registrar. For failure so to return it, each citizen marrying shall be fined $100 (5264). [As to punishment for bigamous marriages unlawfully contracted in another state, see 6377 under 4c.]

CONNECTICUT CASES

1. Hills v. Hobert, 2 Root 48 (1793). **2.** Gould v. Gould, 78 C. 242 (1905). **3.** Smith v. Hall, 69 C. 651 (1897). **4.** Guilford v. Oxford, 9 C. 321 (1832). **5.** Lyman v. Lyman, 90 C. 399 (1916). **6.** Roberts v. State Treasurer, 2 Root 381 (1796). **7.** Kibbe v. Antram, 4 C. 134 (1821). **8.** Goshen v. Stonington, 4 C. 209 (1822). **9.** State v. Schweitzer, 57 C. 532 (1889). **10.** Northrup v. Knowles, 52 C. 522 (1885). **11.** Erwin v. English, 61 C. 502 (1892). **12.** Murray v. Supreme Lodge N.E.O.P., 74 C. 715 (1902). **13.** State v. Dooris, 40 C. 145 (1873). **14.** Eva v. Gough, 93 C. 38 (1918). **15.** Stapleberg v. Stapleberg, 77 C. 31 (1904). **16.** Payne's Appeal from Commissioners, 65 C. 397 (1895). **17.** Roxbury v. Bridgewater, 85 C. 196 (1912). **18.** Benton v. Benton, 1 Day 111 (1803).

DELAWARE

REFERENCES: Revised Code of Delaware, 1915; Laws of Delaware, 1915, 1917, 1918 (special session), 1919, 1920 (special session), 1921, 1923, 1925, 1927; Reports through Volume 31 Delaware and 14 Chancery.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Revised Code and session laws amending them, except that all citations numbered from 2992 to 3000 refer to Laws of 1921, ch. 182, which were substituted for the Code chapter on marriage. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Delaware section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—It shall be necessary for persons intending to be married within this state to obtain a marriage license before the proposed marriage can be lawfully performed (2994), and though no marriage shall be contracted without the production of such license (2993), nothing in this chapter shall be deemed to render invalid for failure to take out a license any common law or other marriage, otherwise lawful (3000). *This statute does not legalize common law marriages but merely validates marriages properly performed but lacking license (1).*

b. Issuer.—Licenses shall be issued by clerks of the peace in the several counties, and by justices of the peace, except that where both parties are non-residents or where either is a minor or divorced person, a person on probation or parole, or a patient or former patient of an insane asylum, licenses shall be issued only by clerks of the peace or their deputies (2995).

c. Compensation of Issuer.—An issuer shall sell for not more than $3.00 a marriage license for which he, if a clerk of the peace, paid the Secretary of State $2.00 or, if a justice of the peace, he paid a clerk of the peace $2.50 (2995). All fees and other perquisites received by the clerk of the peace shall be paid into the county treasury (1433),

the clerk receiving as exclusive compensation an annual salary payable monthly (1438, as amended L. 1917, ch. 88). [There is no provision for compensation of justices of the peace other than by fees collected.—G.M.]

d. Personal Appearance by Candidates.—Before marriage license issuance the parties shall appear together before the issuer who shall examine both parties on oath—except that in case of critical illness of one party his attending physician, upon affidavit that he is at the point of death, may make application for him—and if they claim to be residents of the state and are personally unknown to the issuer, he shall require at least one party to be identified as a resident under oath of a reputable guarantor (2997).

e. Advance Notice and Objections.—Though advance notice is not required for license issurance, the license must be obtained at least twenty-four hours before the ceremony is performed in case of residents, and ninety-six hours in case of two non-residents of the state (2994). *Penalties.* See 2995 and 2999 under 1k, and 3000 under 2g.

f. Minimum Age.—No male under eighteen or female under sixteen years shall marry except when the parties acknowledge on oath that they are the parents or prospective parents of a child, which reason for license issuance shall be endorsed on the application (2998), and no issues shall grant a license if he believes that there is a legal impediment to the marriage as defined by this chapter (2995). *Penalty.* See 2992 and 2995 under 1k. That the male was under eighteen or the female under sixteen years at the time of marriage is ground for divorce at the suit of the nonaged party if the marriage is not confirmed after attaining such age (3006). *Where the facts as to nonage and non-confirmation allow of action, an action in mistaken form for annulment may be amended to allow of divorce (2).*

g. Parental Consent.—No license shall issue if the male applicant is under twenty-one or female under eighteen years unless the parents or a parent, guardian, or curator, or if there be none, the Judge of the Juvenile Court of Wilmington or his appointee for the purpose if the minor resides there, or the resident judge of the county of residence or his appointee, shall first certify under seal their consent, signed, except in case of judges, in the presence of two reputable witnesses. The consent limitations do not apply where the parties acknowledge under oath that they are the parents or prospective parents of a child (2998). *Penalty.* See 2999 under 1k.

h. Mental and Physical Qualifications.—It shall be unlawful for a person to marry who is epileptic, unsound of mind, venereally diseased, or suffering from a communicable disease unknown to the other party, or who is a habitual drunkard or confirmed user of a narcotic drug, or who is or has been a patient in an insane asylum unless he shall file with the clerk of the peace a certificate from the superintendent that he is fit to marry, and such forbidden marriage shall be voidable at the instance of the innocent party (2992). *Penalty.* The guilty party or parties to such a marriage shall be fined $100, and in default of payment shall be imprisoned not exceeding thirty days (2992). [For penalty on license issuer, see 2992 and 2995 under 1k.] A marriage may be annulled for the insanity of either party existing at the time of marriage, if not confirmed after the lunatic regains reason (3004). *Mere imbecility of mind or intoxication is not sufficient ground unless amounting to idiocy or insanity (3).*

i. Form of License.—The license, addressed to any authorized officiant, contains the names and residences of the parties and a statement of the hour at which the license becomes valid authority for solemnizing a marriage; attached are the certificates to be executed by the officiant (2996).

j. Record of License.—The issuer shall immediately note the issuance of a license on the stub thereof, which stub shall be a public record (2996), and within twenty-four hours shall notify the State Registrar of Vital Statistics of the issuance (816). [The similar provision in §2997 as to notice to the state registrar was repealed by L. 1925, ch. 195; quaere whether the provisions of § 816 are to be considered in force.—G.M.] A justice of the peace issuing a marriage license shall send a copy of the application within twenty-four hours to the clerk of the peace of the county of his residence (2997). *Penalties.* A justice of the peace failing to send the required copy shall be fined $100 (2997). Whoever shall violate the article on registration shall be fined from $5.00 to $100 (816; 806). [Note: Papers of divorced persons, asylum patients, probationers, and minors are part of the marriage license application, which the clerk of the peace shall file with the county recorder of the appropriate county and which are open to public inspection only on order of the proper judge (2995).]

k. Other Provisions.—The issuer shall examine each party on oath in the presence of the other as to his name, address, age, color, occupation, parents' names and addresses, if a previous marriage its date, place, and manner of termination, including the date and place

of the death or divorce, and the party shall state whether he is a patient or former patient in an insane asylum or is on probation or parole, and that they are not within the forbidden degrees of relationship, or mentally or physically disqualified [see 1h], which application the parties shall sign, and the license shall be issued only when it appears that the parties are not under the influence of intoxicating liquor or narcotic drug and that no legal impediment to the marriage exists (2997). No divorced person shall marry unless he files with the clerk of the peace a copy of the divorce decree or in lieu thereof a certificate from the resident judge of the county where license is desired or his appointee, and no person on probation or parole under any court or institution without filing the consent of the chief officer of such court or institution or his appointee (2992). No issuer shall issue a license if the papers required are not delivered, if he is not satisfied as to their validity, or if he believes that there is any legal impediment, as defined by this chapter, to the marriage (2995). *Penalties.* For wilful issuance of a license for a consanguineous, miscegenetic, or other forbidden marriage (2992); and for knowingly violating the provisions of this chapter, the issuer shall be fined $100, and in default of payment shall be imprisoned not exceeding thirty days (2995). An applicant knowingly swearing to false answers to the issuer's inquiries is guilty of perjury (2999), and punishable by fine of from $500 to $2000, imprisonment for from one to ten years, and whipping with 40 lashes at the court's discretion (4776). *Because of the presumption of innocence a man cannot be convicted of perjury in swearing falsely in a license application as to the age of the woman except upon proof that he knew her age to be different from what he stated (4).* A person falsely executing a paper under the provisions of this chapter is guilty of a misdemeanor and punishable in the discretion of the court (2999).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by any ordained minister of the gospel and every minister in charge of a recognized church, by the Mayor of Wilmington, and according to the forms of any religious society (2993). *The ministerial character of an officiant may be established by two years' service in administering the sacrament and other ordinances of the church even if general reputation alone does not suffice (5).*

b. Officiant's Credentials.—Authorized officiants and clerks of records of religious societies shall report their names, residences, and

occupations to the State Registrar of Vital Statistics (2993; 817). *Penalty.* A person failing to comply with these requirements shall be fined from $5.00 to $10 (817).

c. Presentation of License.—Production of a license is necessary before the officiant can lawfully perform the ceremony (2993; 2994). *Penalty.* Officiants performing a ceremony between parties without the presentation of a license are punishable by imprisonment not exceeding six months, fine not exceeding $500, or both (3000).

d. Form of Ceremony.—Marriage shall be solemnized in the presence of at least two reputable witnesses who shall sign the certificates, and, if a regular license is produced, may be solemnized according to the usages of any religious society to which a party may belong (2993).

e. Common Law Marriage.—[See 1a.] *Secret, non-ceremonial marriages have never been valid in Delaware as is shown by our legislative history and social policy (1). But common law marriages validly contracted elsewhere will be recognized in Delaware (6), and persons long cohabiting and representing themselves as married, though not in fact married, are estopped to deny the marriage when it is sought to charge them with the civil liabilities growing out of the relation (7) unless such presumption of marriage would involve an inference of bigamy (8).*

f. Irregular Solemnization.—A marriage falsely solemnized by an unauthorized person shall be void unless it be in other respects lawful and consummated with the full belief of either of the parties in its validity (2993). *Penalty.* An unauthorized person falsely solemnizing a marriage shall be fined $100, and in default of payment shall be imprisoned not exceeding thirty days (2993).

g. Other Provisions. *Penalties.* An authorized officiant knowingly assisting in the contracting of a consanguineous, miscegenetic, or other forbidden marriage shall be fined $100, and in default of payment shall be imprisoned not exceeding thirty days (2992). An authorized officiant performing a marriage prior to the expiration of ninety-six hours after license issuance in case of non-residents or twenty-four hours in case of a resident shall be punished by imprisonment not exceeding six months, fine not exceeding $500, or both (3000). Any minister knowingly solemnizing the marriage of a pauper supported in an almshouse shall be fined $50 (1459). [Possibly this provision is superseded by §2992.—G.M.]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—One of the certificates attached to the license the officiant shall give to the bride and the other he shall return within four days to the clerk of the peace of the county in which the license was issued (2996), or in the city of Wilmington within five days to the registrar (secretary of the board of health) (2151). *Penalties.* Any officiant failing so to return the certificate shall be fined $25 (2996), Any officiant making a false certificate shall be fined $100 (3000).

It shall be the duty of the officiant to make full return of each marriage before the tenth day of the following month to the local registrar of vital statistics of the district where the marriage was solemnized (814, as amended L. 1915, ch. 60). *Penalty.* Whoever violates a provision of the article on registration or makes a false certification shall be fined from $5.00 to $100 (806).

b. Local Record.—On return of the certificate the clerk of the peace shall immediately record the date of marriage and the name of the officiant in a book open to public inspection (2996). *Penalty.* Any clerk of the peace or deputy knowingly violating a provision of the chapter on marriage shall be fined $100, and in default of payment shall be imprisoned not exceeding thirty days (2995).

Each local registrar of vital statistics shall make and keep one copy of each marriage certificate received (803, as amended L. 1925, ch. 64). The local registrar is charged with the enforcement of the provisions on registration under the supervision of the state registrar (819, as amended L. 1915, ch. 60). *Penalty.* Whoever violates any provision of the article on registration shall be fined from $5.00 to $100 (806).

c. State Record.—The officiant within twenty-four hours shall report the marriage to the State Registrar of Vital Statistics which report shall in no way supplant the filing of the certificate as provided (814, as amended L. 1915, ch. 60). [See 3a.] *Penalty.* Every officiant failing to report as required shall be fined from $5.00 to $25 (814, as amended L. 1915, ch. 60; 818).

Upon certification that the original certificate of marriage has been received at the State Bureau of Vital Statistics, the county treasurer pays the local registrar 25 cents for making his copy thereof (803, as amended L. 1925, ch. 64). [By §797 the Board of Health prepares necessary methods for obtaining records and thereunder has made a regulation requiring local registrars to make monthly returns (Reg.

B. of H. 1 May 1919, No. 7).—G.M.] *Penalty.* Any local registrar neglecting to perform any duty imposed upon him by the directions of the state registrar shall be fined from $10 to $100 (806). [See R.C. 800 under 5.]

d. Evidence.—The marriage record book of the clerk of the peace shall be admitted in any court of record as evidence of the facts therein contained (2996; 4235), as shall a certified copy of the record of the state registrar (805), and of the registry of marriages kept by religious societies (2171). No greater evidence of marriage is required in a desertion prosecution than in a civil action (3041; 4236). *A marriage certificate, issued long after marriage and not authenticated, not being part of the* res gestae, *is not admissible in absence of a statute (9).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Marriages within the prohibited degrees are void (2992). A marriage within the established degrees of consanguinity or affinity may be annulled on suit of either of the parties during the lifetime of both (3004). *Penalty.* Incestuous fornication within the following degrees of consanguinity or affinity is punishable by fine not exceeding $500 and imprisonment not exceeding seven years: parent, child, grandchild, uncle or aunt, brother or sister, parent's or child's spouse, spouse's child or grandchild (4788, as amended L. 1915, ch. 243). [Marriages within the degrees prohibited by §2992 being void, persons so intermarrying (except cousins) would be subject to this penalty.—G.M.] *The legislature by special act may validate a marriage within the forbidden degrees (10).*

b. Proper Civil and Racial Status.—Marriage shall not be contracted between a white person and a Negro or mulatto, or between paupers, or by a person on probation or parole under any court or institution unless he first file a consent from the chief officer of the court or institution, the marriage between a white person and a Negro being void, and the others voidable by the innocent parties (2992). *Penalty.* The guilty party or parties to such a marriage shall be fined $100 and in default of payment shall be imprisoned not exceeding thirty days (2992). [For penalties on issuer and officiant, see 2992 under 1k and 2g.]

c. Proper Legal Status.—A marriage contracted when either party had a spouse living may be annulled at the suit of either party (3004).

Marriage with another during the life of a spouse is punishable by fine of from $400 to $2000 and imprisonment of from three months to six years, whether the marriage is contracted within this state or by a resident of the state going elsewhere with intention to return and reside here, and returning accordingly (4785), but no person shall be convicted of bigamy if the first spouse shall have been absent for five years, and not known to the accused to be alive, or believed by the accused on other good grounds to be dead, or if the former marriage has been legally dissolved (4786). [As to penalty on license issuer, see 2992 under 1k.] *The penalty upon a resident contracting a bigamous marriage elsewhere with intent to return and reside here is constitutional as defining an offense against the morals of this state (11). [In fact in the Bacon case, however, there was no cohabitation in Delaware under the bigamous marriage.—G.M.] A defendant in a bigamy prosecution denying the validity of his first marriage because of the wife's pre-existing marriage has the burden to prove it (12).*

The decree nisi for divorce does not become absolute for one year (3026). *Remarriage elsewhere within a year after a decree nisi is ground to vacate the decree, leaving the first marriage intact and making the second void (13). The presumption in favor of the validity of a subsequent marriage can be overcome only by satisfactory proof of a previous marriage (14).*

d. Proper Consent of Parties.—*Whether there is actual consent to a marriage is a question for the jury in an ejectment action depending upon the validity of a marriage (15).* Marriage, unless confirmed, may be annulled for fraud, force, or coercion at the suit of the innocent party (3004). *The fraud necessary for annulment must not merely concern wealth or social position but must go to the essence of the marriage contract (16).*

5. STATE SUPERVISION

The State Registrar of Vital Statistics is charged with the execution of the article on registration and with supervisory power over local registrars, shall have authority to investigate violations of requirements, may bring action before a justice of the peace, the Attorney General prosecuting violations reported by the state registrar (819, as amended L. 1915, ch. 60), and may require further information to make the record complete (802). *Penalty.* A local registrar failing to make prompt returns shall be removed from office by the State Board of Health and be subject to other prescribed penalties (800).

All regular forms used in connection with the issuance of marriage licenses (not including certificates of judges or asylum superintendents) shall be furnished by the Secretary of State, except that postcards for the reporting of license issuance are supplied by the State Board of Health (2995). Forms for the registration of marriages are prepared by the State Board of Health (797).

6. INTERSTATE RELATIONS

A marriage validly contracted elsewhere according to the common law is valid here (6). Parties, either of whom is a legal resident of this state, contracting elsewhere a consanguineous, miscegenetic, or other forbidden marriage, and thereafter cohabiting here, shall be punished as if the marriage had been contracted here (2992). [See 2992 under 1k, 4a, 4b, and 4c, and 4785 under 4c.] [It is submitted that there could be no prosecution in Delaware for a marriage validly contracted elsewhere with no evasive intent of the party resident in Delaware. —G.M.]

DELAWARE CASES

1. Wilmington Trust Co. v. Hendrixson, 1 W.W. Harr. 303 (1921). **2.** Jester v. Jester, 4 Boyce 542 (1914). **3.** Elzey v. Elzey, 1 Houst. 308 (1857). **4.** State v. Dryden, 3 Boyce 466 (1912). **5.** Pettyjohn's Executor v. Pettyjohn, 1 Houst. 332 (1857). **6.** Petras v. Petras, 7 Boyce 290 (1919). **7.** State v. Oaks, 1 Boyce 576 (1910). **8.** Petition of Frisby, 12 Chan. 431 (1920). **9.** Hooven v. Hooven, 130 Atl. 495 (1925). **10.** Moore v. Whitaker, 2 Harr. 50 (1814). **11.** State v. Bacon, 1 W.W. Harr. 176 (1920). **12.** State v. Ryan, 1 Penn. 81 (1897). **13.** Petition of Attorney General—Senn v. Senn, 5 Boyce 259 (1915). **14.** State v. Collins, 6 Boyce 260 (1916). **15.** Doe d. Burton v. Wright, 2 Houst. 49 (1858). **16.** Williams v. Williams, 118 Atl. 638 (1922).

DISTRICT OF COLUMBIA

REFERENCES: Code of Law for the District of Columbia (1924); Acts of Congress Affecting the District of Columbia, Sixty-eighth Congress, Second Session; United States Code, 1926;[1] Reports through Volume 56.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the District of Columbia Code unless stating that they refer to the United States Code. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this District of Columbia section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—No officiant shall perform a marriage ceremony without first receiving a license therefor addressed to him (1290).

b. Issuer.—License is issued from the clerk's office of the supreme court of the District of Columbia (1290).

c. Compensation of Issuer.—The clerk's fee for each marriage license is $1.00 (1110). The clerk of the supreme court of the District of Columbia shall pay all fees into the Treasury of the United States and shall receive in lieu thereof an annual salary fixed by the Attorney General at from $2500 to $5000 (U. S. Code, 28: 557, 558).

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—[No statutory provision as specific condition to license issuance. See 1k.] A marriage where either party is under the age of consent, sixteen years for males and fourteen for females, is illegal, and shall be void upon declaration of nullity by decree (1285) unless there is voluntary cohabitation after coming to legal age (966). A proceeding to declare the nullity of a marriage of an infant under the age of consent may be instituted by the infant

[1] As to application to the District of Columbia of the general acts of Congress, see Johnson v. U. S., 225 U. S. 405 (1912).

through a next friend or by the parent or guardian, but not by the capable party who knowingly contracted the illegal marriage (1286).

g. Parental Consent.—The clerk shall not issue a license to any male applicant under twenty-one or any female under eighteen years not previously married, unless the father of such minor, the mother if there be no father, or the guardian if there be no parent, give consent either personally or in writing attested by a witness and proved to the satisfaction of the clerk (1292). *Penalty.* Whoever falsely personates another person before an officer authorized to grant marriage licenses, with intent to defraud, shall be imprisoned for from one to five years (859).

h. Mental and Physical Qualifications.—[No provision as condition to license issuance.] A marriage where either party is an idiot or lunatic, or is incapable for physical causes of entering into the marriage state, is illegal and shall be void upon declaration of nullity by decree (1285), if there has been no voluntary cohabitation after the lunacy (966). *To allow of annulment the insanity need not be previously adjudged in an independent proceeding but may be established in the annulment action itself (1). Epilepsy is not an obstacle to marriage in the District of Columbia (2). Pregnancy by another man at the time of marriage, unknown to the husband, may allow of annulment (3). Where the parties themselves had antenuptial intercourse, quaere (4). The proper form of action in pregnancy cases is divorce on the ground of matrimonial incapacity at the time of marriage (5).*

i. Form of License.—The license, authorizing the celebration of marriage between the parties whose names and residences are stated, is addressed to some particular officiant and commands him to return the same within ten days under penalty (1293).

j. Record of License.—The clerk shall provide a record book consisting of applications and licenses in blank, numbered consecutively, to be filled up by him with the names and residences of the parties to whom licenses have been issued (1295).

k. Other Provisions.—Before issuing any license the clerk of the supreme court shall examine the applicant under oath to ascertain the names, ages, and color of the parties, whether previously married, whether related, and if so, in what degree, and if under age, the names of their parents or guardians, which facts shall appear on the application (1291). *Penalty.* False swearing in regard to such facts shall be perjury (1291), punishable by imprisonment of from two to ten years (858).

2. SOLEMNIZATION

a. Officiant.—Marriage may be celebrated by any authorized minister appointed or ordained according to the rites of his church, whether residing in the District or elsewhere in the United States, by any justice of the peace or judge or justice of any court of record, and between members of any religious society not having a minister, according to the manner practiced in such society (1288).

b. Officiant's Credentials.—Every minister appointed or ordained according to the ceremonies of his church may be authorized by any justice of the supreme court of the District to celebrate marriages therein (1288).

c. Presentation of License.—No officiant shall perform a marriage ceremony without first having a license delivered to him (1290). *Penalty.* For violation, a penalty of not more than $500 can be recovered upon information (1290).

d. Form of Ceremony.—[No general provision.] Marriages of members of any religious society not requiring the intervention of a minister for the celebration of marriage may be celebrated in the manner practiced in such society, the license in such case being issued to and the return made by a person appointed by such society for that purpose (1288).

e. Common Law Marriage.—For the purpose of preserving the evidence of marriages, ministers may be authorized to celebrate marriages (1288). *It is doubtful whether a marriage* in facie ecclesiae *was ever necessary to legitimacy* (*6*). *An informal common law marriage was valid in the District of Columbia in 1865* (*7, citing Meister* v. *Moore, 96 U.S. 76*).

f. Irregular Solemnization.—*Penalties.* Anyone celebrating marriage when not authorized is subject to a penalty of not more than $500 (1289; 1290). Whoever falsely represents himself to be an officer or minister qualified to celebrate marriage and attempts to exercise the authority shall be imprisoned for from one to three years (860).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—Within ten days after a marriage, return shall be made in person or by mail on a coupon issued with the license and bearing a corresponding number, such return stating the

names of the parties and date of celebration. A second coupon issued with the license shall be given to the parties by the officiant, certifying the fact and date of marriage (1293). [As to returns by societies celebrating marriage without a minister, see 1288 under 2d.] *Penalty.* Any officiant failing to make return as required shall be liable to a penalty of $50 upon information (1294).

b. Local Record.—Clerks shall provide a book for the record of certificates returned by officiants, corresponding to the record book of licenses issued (1295). *Penalty.* Any government officer charged with the duty of keeping records who, with intent to deceive, shall make a false entry of a matter connected with his duties shall be fined not more than $5000, imprisoned not more than ten years, or both (U.S. Code, 18:189).

d. Evidence.—A copy of any license and certificate recorded by the clerk shall be competent evidence of the marriage (1295). *The bond given by a defendant in a bigamy prosecution to the clerk of court in Virginia to obtain a marriage license is not admissible in the prosecution here (8).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Any marriage within the prohibited degrees shall be absolutely void ab initio without decree; its nullity may be shown in any collateral proceedings (1283), but may also be declared by judicial decree (1284). [See 1291 under 1k.] *Penalty.* Persons in the District who knowingly intermarry, being related within and not including the fourth degree of consanguinity, computed according to civil law, shall be punished by imprisonment for not more than twelve years (875). [Marriages between persons related by blood as near as uncle and niece or aunt and nephew only would seem to be criminal; fornication, as under a void marriage, is not a crime in the District of Columbia.—G.M.]

b. Proper Civil and Racial Status.—No provision.

c. Proper Legal Status.—Marriage of a person whose previous marriage has not been terminated by death or divorce is prohibited, shall be absolutely void ab initio (1283), and may be declared to have been void by court decree (966; 1284). *The marriage of a person already married is void (9).* Whoever, having a spouse living, marries another shall be imprisoned for from two to seven years, unless such spouse has been continually absent and not known to such person to be living for five successive years preceding such marriage, or

unless the previous marriage shall have been dissolved or pronounced void (870). *The general act of Congress in relation to bigamy [now U. S. Code 18:513] is not applicable to the District of Columbia (10). To be within the bigamy exception one must remarry not only after a lapse of the prescribed period but the absentee must be the spouse who left the one remarrying (11).*

The innocent party only to a divorce for adultery [the one ground for absolute divorce] may remarry, except that the divorced parties may remarry each other (966). *Although the prohibition of remarriage has no extraterritorial effect, the courts will not lend their support to claims founded upon violation of the statute by evasive marriage contracted elsewhere (12); the innocent party alone may profit by the provision (13). In action for annulment because of a prior marriage the burden is on the one attacking the later marriage to show the former spouse to have been alive (14).*

d. Proper Consent of Parties.—*Lack of consummation does not annul a marriage not otherwise void (15).* A marriage where the consent of either party has been procured by force or fraud is illegal and shall be void on declaration of nullity by decree (1285; 966). *Fraud allowing of annulment must go to the essence of the marriage relation (16), such as antenuptial pregnancy by another person, unknown to the husband (3)—at least if there was no premarital intercourse between the parties themselves (4)—and not merely consist of misrepresentations as to social position, disposition, and such accidental qualities (16). But condonation of the fraud by continued cohabitation after its discovery constitutes ratification and precludes annulment (3, 14, 17).* [Note: *Penalty.* Any person detaining a female against her will with intent to compel her to marry him or any other person shall be imprisoned for from one to five years and fined not more than $1000 (36 Stat. L., Pt. 1, p. 833 (Code, p. 508), §1).]

5. FEDERAL SUPERVISION

No provision.

6. INTERSTATE RELATIONS

Marriages declared illegal by the aforegoing sections, being entered into in other jurisdictions by persons retaining their domicil in the District, shall be deemed illegal and may be decreed void as if celebrated in said District (1287). [The marriages referred to are those prohibited because of relationship, prior marriage, idiocy, lack of proper consent, impotency, and because the parties were under the

age of consent.] *Generally a marriage valid where contracted is recognized as valid here (7, 12), though forbidden by the law of the District of Columbia (12). The law of the domicil may govern in a case of incest (18).*

7. SEX OFFENSES AND MARRIAGE

In absence of an express statute intermarriage of the parties should not bar prosecution for seduction, and certainly not bar sentence after conviction, though it may be considered in mitigation of punishment (19).

DISTRICT OF COLUMBIA CASES

1. Mackey v. Peters, 22 App. 341 (1903). **2.** Van Kirk v. Van Kirk, 41 Wash. L. Rep. (D.C.) 438 (1913). **3.** Lenoir v. Lenoir, 24 App. 160 (1904). **4.** Cogswell v. Cogswell, 49 App. 31 (1919). **5.** Caton v. Caton, 6 Mackey 309 (1888). **6.** Diggs v. Wormley, 21 D.C. 477 (1893). **7.** Travers v. Reinhardt, 25 App. 567 (1905). **8.** U. S. v. Lambert, 2 Cranch C.C. 137 (1817); also, Fed. Cas. No. 15,554. **9.** Tendler v. Tendler, 56 App. 296 (1926); 12 Fed. (2d) 831; certiorari denied, 47 Sup. Ct. 96. **10.** U.S. v. Crawford, 17 D.C. 319 (1888). **11.** Knight v. U.S., 6 App. 1 (1895). **12.** Olverson v. Olverson, 54 App. 48 (1923); also, 293 Fed. 1015. **13.** Sammons v. Sammons, 46 Wash. L. Rep. 39 (1918). **14.** Alexander v. Alexander, 36 App. 78 (1910). **15.** Payne v. Payne, 54 App. 149 (1924); also, 295 Fed. 970. **16.** Williamson v. Williamson, 34 App. 536 (1910). **17.** Farr v. Farr, 2 McA. 35 (1875). **18.** Tyler v. Andrews, 40 App. 100 (1913). **19.** Bray v. U.S., 39 App. 600 (1913).

FLORIDA

REFERENCES: Revised General Statutes of Florida (three volumes), 1920; Florida Cumulative Statutes, 1925; Laws of Florida, 1925 (extraordinary session), 1927; Reports through Volume 88.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Revised General Statutes, unless specifically citing the Cumulative Statutes which are supplementary thereto, and to session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Florida section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Before any of the persons authorized shall solemnize any marriage, he shall require of the parties a marriage license (3935). [*The provision is directory only. See* 2e.]

b. Issuer.—License is issued by the county judge of the county wherein the woman resides (3933).

c. Compensation of Issuer.—The county judge shall issue licenses upon payment of his fee of $2.00 (3933) and an additional fee of $1.00 of which he shall transmit 75 cents to the Bureau of Vital Statistics and retain the remainder (L. 1927, ch. 11869, §§1, 3). Every county official paid by fees shall retain such compensation only up to stipulated maxima (C.S. 1813). In counties of from 12,700 to 13,000 population, the county judge receives a salary in addition to fees (L. 1927, ch. 11952).

d. Personal Appearance by Candidates.—No provision. [See 3933(1) under 1k.]

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—No statutory provision. *A female of twelve years may contract a valid marriage under the common law here in force (1).*

g. Parental Consent.—Before issuing a license the judge shall require an affidavit, signed by both parties and subscribed before some person authorized to administer oaths, stating the true ages of such parties. The judge shall require satisfactory evidence of the consent of the parent or guardian of a minor under twenty-one years and not previously married. Written consent of the parents of such minor, acknowledged before an officer authorized by law to administer oaths, must be filed with the judge before license is issued, except where both parents are deceased (3933; C.S. 3933(2)). *Penalty.* Any county judge or other person violating §3933(2) shall be guilty of a felony, punishable by imprisonment for not more than one year or fine not exceeding $500 (C.S. 5381(1)). [Note: A person fraudulently enticing away an unmarried female under sixteen from her parent, guardian, or master, without their consent, for the purpose of effecting a clandestine marriage without such consent, shall be imprisoned not exceeding one year or fined not exceeding $1000 (5411). *Such clandestine marriage is punishable only when fraud is practiced on the girl under sixteen herself in order to entice her away and not if practiced upon the parents in order to effect the marriage without their consent* (*2*).]

h. Mental and Physical Qualifications.—No statutory provision. *Intoxication to any degree less than to constitute deprivation of reason does not render a marriage invalid* (*3*).

i. Form of License.—No provision.

j. Record of License.—The judge shall keep a correct copy of all marriage licenses issued, with the names of the parties and date of issuance (3936).

k. Other Provisions.—The judge shall issue a license if there appears no impediment to the marriage (3933). It shall be unlawful for any county judge to send out of his office any marriage license signed in blank to be issued upon application to persons not in such office (C.S. 3933(1)). [The persons mentioned are presumably not applicants for license to marry but officials to be applied to for such license.—G.M.] *Penalties.* Any county judge or other person violating §3933(1) shall be guilty of a felony, punishable by imprisonment for not more than one year or fine not exceeding $500 (C.S. 5381(1)). County judges are expressly prohibited from knowingly issuing a license to persons under the disabilities mentioned in §3938 [cited under 4b], concerning miscegenetic marriages, under the penal sum of $1000, to be recovered by action of debt (3940). For know-

ingly issuing a license for a white person to marry a Negro, mulatto, or person of one-eighth Negro blood, a county judge shall be imprisoned not exceeding two years or fined not exceeding $1000 (5420).

2. SOLEMNIZATION

a. Officiant.—All regularly ordained ministers in communion with some church and all judicial officers and notaries public of this state are authorized to solemnize marriage (3934).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—Before solemnizing a marriage the officiant shall require of the parties a license (3935).

d. Form of Ceremony.—No provision.

e. Common Law Marriage.—No statutory provision. *A marriage valid at common law is valid notwithstanding statutory requirements which do not declare null a marriage in violation thereof (4). The statutory provisions as to marriage are directory only (5, 6). A marriage* per verba de futuro cum copula *is not to be recognized here, and there can be no common law marriage without words of present assent and lack of future condition (7, 8).*

f. Irregular Solemnization.—No provision.

g. Other Provisions.—*Penalties.* For knowingly performing the marriage ceremony between persons prohibited to intermarry by §3938 [cited under 4b], concerning miscegenation, the officiant shall forfeit the penal sum of $1000, to be recovered for the use of the school fund (3941). For wilfully performing the marriage ceremony for a white person with a Negro, mulatto, or person of one-eighth Negro blood, the officiant shall be imprisoned not exceeding one year or fined not exceeding $1000 (5421).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—Within ten days after solemnizing a marriage the officiant shall make a certificate thereof on the license and transmit the same to the office of the county judge from which it issued (3935).

b. Local Record.—Upon return of the license and certificate the county judge shall enter of record the name of the officiant and the date of the marriage and return (3936; L. 1927, ch. 11869, §2). [Note: Whenever an officiant has not made a certificate, or the

license has been lost, the marriage may be proved by affidavit made by two competent witnesses to the ceremony, which affidavit may be recorded in the office of the license issuer with the same effect as if the proper certificate had been recorded (3937).]

c. State Record.—The county judge shall transmit all original licenses with endorsements thereon monthly to the Bureau of Vital Statistics, together with a report of the licenses issued and not returned or returned and not recorded, or a statement that no licenses have been issued (L. 1927, ch. 11869, §2). The records of marriages shall be preserved like other vital statistics (L. 1927, ch. 11869, §5). [Note: The State Board of Health shall have the power to promulgate and enforce rules for the collection of marriage statistics (2094).]

d. Evidence.—A certified copy of any marriage license on file with the Bureau of Vital Statistics, signed by the registrar under seal of the State Board of Health, shall be received as evidence in all courts (L. 1927, ch. 11869, §6). *The original record of the marriage license is proper evidence although a certified copy would also be admissible* (*9*).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (5415). Divorce may be granted if the parties are within the degrees prohibited by law (3191). *Penalty.* Persons who intermarry within the degrees of consanguinity within which marriages are prohibited or declared by law incestuous and void shall be imprisoned in the state prison not exceeding twenty years or in the county jail not exceeding one year (5414).

b. Proper Civil and Racial Status.—Marriage of any white person in this state with any Negro shall be unlawful and utterly null and void, and the issue shall be regarded as bastard (3938). *The provision has no extraterritorial effect* (*10*). Every person having one-eighth or more Negro blood shall be deemed a Negro (3939). [As to prohibition of license issuance and solemnization, see 3940 and 5420 under 1k and 3941 and 5421 under 2g.] *Penalty.* If any white person marry a Negro or any person having one-eighth Negro blood, either or both parties shall be imprisoned not exceeding ten years or fined not exceeding $1000 (5419).

c. Proper Legal Status.—Divorce may be granted if either party had a spouse living at the time of marriage (3191). Whoever, having a former spouse living, marries or continues to cohabit with another in this state shall be imprisoned in the state prison not exceeding five

years, or in the county jail not exceeding one year, or be fined not exceeding $500 (5416), unless such former spouse continually remained beyond the sea or voluntarily deserted and remained absent for three years continuously, not known to the person marrying again to be living within that time, or unless the person remarrying had been divorced (5417). *A second marriage is void if contracted during the subsistence of a previous marriage which was not validly dissolved by an attempted legislative divorce (11).*

d. Proper Consent of Parties.—No statutory provision. *Marriages* per verba de praesenti *do not require consummation (1). The fraud necessary to make criminal a clandestine marriage without parental consent must be practiced upon the girl herself to entice her away (2).* [*See* 1g.] *Duress allowing of annulment must have dominated the transaction and deprived the one influenced from acting as a free agent at the time of marriage (12). Fraud and duress make a marriage voidable only, not void, and may not be pleaded collaterally in another action based upon the marriage (13). A marriage invalid for want of mental capacity may be ratified by subsequent conduct, such as cohabitation, amounting to recognition (3).*

5. STATE SUPERVISION

The Bureau of Vital Statistics shall prescribe and furnish all forms used in the issuance of marriage licenses and forms on which records of marriages are transmitted to it (L. 1927, ch. 11869, §§2, 7). [Note: The State Board of Health shall have the power to promulgate and enforce rules for the collection of marriage statistics (2094). *Penalty.* A person violating such rules shall be fined from $5.00 to $100 (5550).]

6. INTERSTATE RELATIONS

No statutory provision. *A marriage validly contracted in another state between residents thereof is recognized in Florida though it would have been void if contracted here (10).*

FLORIDA CASES

1. Green v. Green, 77 F. 101 (1919). **2.** Hay v. State, 68 F. 458 (1914). **3.** Prine v. Prine, 36 F. 676 (1895). **4.** Daniel and Sams v. Sams, 17 F. 487 (1880). **5.** Caras v. Hendrix, 62 F. 446 (1911). **6.** Warren v. Warren, 66 F. 138 (1913). **7.** Marsicano v. Marsicano, 79 F. 278 (1920). **8.** Chaves v. Chaves, 79 F. 602 (1920). **9.** Ferrell v. State, 45 F. 26 (1903). **10.** Whittington v. McCaskill, 65 F. 162 (1913). **11.** Ponder v. Graham, 4 F. 23 (1851). **12.** Beeks v. Beeks, 66 F. 256 (1913). **13.** Tyson v. State, 83 F. 7 (1922).

GEORGIA

REFERENCES: Park's Annotated Code of Georgia (seven volumes), 1914; Supplement 1922 (four volumes); Supplement 1926 (two volumes); Georgia Laws, 1927; Reports through Volume 162 Georgia and 35 Georgia Appeals.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Civil Code, unless otherwise noted, or to amendments thereof as appearing in the Supplements and session laws. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Georgia section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Marriage licenses shall be granted (2936, S. 1926). [As to solemnization without license, see penalties under 2c. As to solemnization after publication of banns instead of license, see 2937 under 3a and 2939 under 2c.] *A license is not essential to the validity of a marriage* (*1, 2, 3*). [*See* 2e.]

b. Issuer.—License shall be granted by the ordinary, or his deputy, of the county where the female to be married resides or, if she be a non-resident, by the ordinary of the county in which the ceremony is to be performed (2936, S. 1926). *Penalty.* Any ordinary who, himself or deputy, knowingly issues a license for the marriage of a female domiciled in another county shall forfeit $500 to the educational fund of the county (2938, S. 1926). *Inasmuch as lack of license altogether does not invalidate a marriage, improper issuance in the wrong county does not render the marriage illegal* (*3*). *Although not essentially a judicial act, marriage license issuance is a proper duty to impose on a judicial officer* (*4*) *and is not so wholly ministerial that the ordinary can contract with an unauthorized person to issue licenses* (*5*).

c. Compensation of Issuer.—Ordinaries are entitled to a fee of $1.50 for every license (4827), and in counties having a population of

not more than 40,000 to a fee of $2.25 for every license, whole service (4827a, S. 1922), which fees shall be paid over each month for the sole use of the county in counties having a population of from 44,000 to 150,000 and those of over 200,000 (615f, 615n, 615aa, S. 1926), wherein the officers receive fixed salaries as their only compensation (615b, 615i, 615bb, S. 1926). [It would seem that the fee system is still applicable in counties with a population of less than 44,000 and between 150,000 and 200,000.—G.M.]

d. Personal Appearance by Candidates.—"Marriage license shall be issued . . . on written application made by the person seeking license therefor, verified by oath of applicant" (L. 1927, p. 224, §1a). No license shall be granted until the ordinary or his deputy shall have secured written answers under oath from the parties, or either of them, to certain questions [see 2936 under 1k], which answers shall be certified to by the ordinary or his deputy (2936, S. 1926).

e. Advance Notice and Objections.—Except in cases where the persons have arrived at the age of twenty-one years or where the parents or guardian of the female appear in person and consent in writing to the issuance of a license, the ordinary or his deputy, immediately upon receiving application, shall post in his office a notice giving the names and residences of the parties and the date of application. In the case of persons under twenty-one years, no license shall be issued within five days following application, within which period objections may be entered; provided that in case of emergency the judge of the court having probate jurisdiction may authorize issuance before the expiration of five days. When the applicant for license claims the party to be twenty-one years of age or over, the ordinary must satisfy himself that the contention as to age is true; if he does not himself know both parties to be over twenty-one years, he shall require birth certificates or in lieu thereof affidavits from at least two persons to that effect; and if the ordinary is unconvinced, he shall post the notice for five days (2938, as amended L. 1927, p. 224). [Note: Courts of ordinary exercise general and exclusive jurisdiction in probate matters (4790). It would seem then that the ordinary himself must issue the license in cases of emergency and not his deputy.—G.M.] *Penalty.* Any ordinary who, himself or deputy, fails to post in his office facts pertaining to the application, or issues a license in violation of the time provisions, shall forfeit $500 to the educational fund of the county (2938, as amended L. 1927, p. 224).

f. Minimum Age.—[No provision as specific condition to license issuance. See 2936 under 1k and 2938 (Penalty) under 1g.] A male must be at least seventeen and a female at least fourteen years to be able to contract marriage (2931). Marriages of persons unable to contract are void (2935). *The word "void" here means only imperfect or voidable; the marriage contracted below the prescribed age is subject to ratification by continued cohabitation after attaining such age (6, 7, 8, 9) and, though void but for such ratification (10, 11), may establish rights against one interfering with the relation (12).*

g. Parental Consent.—The ordinary, or his deputy, shall inquire as to the ages of all applicants for licenses, and if there be any grounds of suspicion that the female is under eighteen years, shall refuse to grant license without the written consent of the parents or guardians of such minor, if there be any (2938, as amended L. 1927, p. 224). *Penalty.* Any ordinary who, himself or deputy, shall knowingly grant such license without such consent, or without proper precaution in inquiring as to minority, shall forfeit $500 to the educational fund of the county (2938, as amended L. 1927, p. 224). [As to consent given in person by the female's parent dispensing with the posting of the license application, see 1e.] *The marriage of a girl over fourteen years is binding regardless of lack of parental consent (13, 14), and the man marrying her in good faith is not guilty of kidnapping in taking her away without fraud or force but against the will of the parents (14).*

h. Mental and Physical Qualifications.—[No statutory provision as condition to license issuance.] To be able to contract marriage a person must be of sound mind (2931), and the marriages of persons unable to contract are void (2935). Total divorce may be granted for mental incapacity at the time of marriage (2945). [As to penalty on officiant for knowingly solemnizing the marriage of an idiot or lunatic, see Pen. C. 677 under 2g. As to drunkenness at the time of marriage being fraud, see 2933 under 4d.] *Although the marriages of persons insane and unable to contract—if insanity at the time of marriage is proved (15)—are absolutely void from the beginning (16, 17), still under the code any direct action by a party must be for divorce rather than for declaration of nullity (18) or annulment (19).* Total divorce may be granted for pregnancy of the wife at the time of marriage, unknown to the husband (2945). *But not so for antenuptial unchastity even though misrepresented (20).*

i. Form of License.—The license, authorizing the marriage of the persons named, is directed to any officiant and requires him to return

it to the issuer with his certificate within thirty days (2936, S. 1926). [As to answers to interrogatories being recorded on the license, see 2936 under 1k.]

j. Record of License.—The application shall be filed in the office of the ordinary before the license shall be issued and shall be made a permanent record (L. 1927, p. 224, §1a).

k. Other Provisions.—No license shall be granted until the parties, or either of them, shall have answered under oath the following questions concerning each: name; residence—city, county, and state; age; relationship; white or colored; previously married; divorced —upon what grounds, when and where; any legal impediment; date and place of contemplated marriage; parents' residence and nationality; which answers shall be recorded on or attached to the marriage license (2936, S. 1926). The application for license shall state the names and addresses of the parties and their parents, the dates of the parties' birth, and the absence of any legal impediment to the marriage, the truth of the recitals in which shall be supported by affidavits of two reputable American citizens (L. 1927, p. 224, §1a). *Penalty.* Any officer knowingly issuing a license for the marriage of a white person and one of African descent is guilty of a misdemeanor (Pen. C. 678). [Note: A misdemeanor is punishable by fine not exceeding $1000, imprisonment not exceeding six months, work in a chain-gang not exceeding twelve months, any one or more of these punishments in the discretion of the judge (Pen. C. 1065).] [As to bond to be furnished by a seducer on procuring marriage license, see Pen. C. 379 under 7.]

2. SOLEMNIZATION

a. Officiant.—Marriage licenses shall be directed to any judge, justice of the peace, or minister of the gospel (2936, S. 1926). Ordained colored ministers shall celebrate marriage between persons of African descent only, under the same regulations as required for marriages between white citizens (2179). Upon request, the ordinary may direct the license to any Jewish minister, or other person authorized by the rules of any religious society to perform the marriage ceremony, who shall make return thereon as required (2940). *Inasmuch as common law marriages are recognized, a marriage before an excommunicated minister is valid (1).* [*See* 2e.]

b. Officiant's Credentials.—No provision.

c. Presentation of License.—The license authorizes the marriage of the persons named (2936, S. 1926). *Penalties.* Any officiant joining persons in marriage without a license or the publication of banns shall forfeit $500 to the educational fund of the county (2939), and is guilty of a misdemeanor (Pen. C. 677). [As to penalty for misdemeanor, see Pen. C. 1065 under 1k.] *Solemnization under a license issued in the wrong county does not subject the officiant to penalty (3).*

d. Form of Ceremony.—No provision.

e. Common Law Marriage.—To constitute a valid marriage there must be parties able to contract, an actual contract, and consummation according to law (2930). *In absence of a nullifying provision statutory requirements are directory only (1), and the common law rule as to informal marriages by agreement plus cohabitation prevails in Georgia (6, 21, 22). Matrimonial cohabitation, reputation, and conduct may authorize the inference of marriage according to the common law (23) and estop a party thereto to deny its validity (24), especially after great lapse of time (21) and failure to dissent thereto (22). But not so, intermittent cohabitation under promise of marriage (25) or "just taking up together" without ceremony (26).*

Where a ceremonial marriage is void because of an existing impediment to the marriage of one of the parties, unknown to the other, if the parties desire and intend matrimony and continue to cohabit after removal of the impediment, a renewed consent will be inferred and a common law marriage established as of the time of removal of the impediment (23, 27, 28, 29). [*See Drawdy v. Hesters, discussed under* 4c.]

f. Irregular Solemnization.—A marriage otherwise valid and so considered by the parties shall not be affected by want of authority in the officiant, nor shall objection be heard from one party who has fraudulently induced the other to believe the marriage legal (2942).

g. Other Provisions.—*Penalties.* Any officiant knowingly solemnizing a marriage where either party is an idiot or lunatic, or subject to any other disability which would render said marriage improper and illegal—or where one party is white and the other of African descent (Pen. C. 678)—is guilty of a misdemeanor (Pen. C. 677). [As to penalty for misdemeanor, see Pen. C. 1065 under 1k.]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant within thirty days after a marriage shall return the license to the ordinary with his certificate thereon as to the fact and date of marriage (2936, S. 1926). [So also

as to Jewish ministers and others by §2940, cited under 2a.] Any officiant joining in marriage persons whose banns have been published shall certify the fact to the ordinary of the county where such banns were published (2937).

b. Local Record.—The ordinary shall record the license with the return thereon (2936, S. 1926). The ordinary of the county where banns are published shall record in the book with licenses the officiant's certificate of the marriage solemnized under authority of such banns (2937).

c. State Record.—No provision.

d. Evidence.—The application for marriage license, filed by the ordinary, may be used as evidence in any court (L. 1927, p. 224, §1a). A certified copy of a record of a public officer of this state is admissible in evidence (5798), as is a properly certified and authenticated record in a public office of another state (5827). In action for adultery or criminal conversation marriage may be proved by general reputation and cohabitation as man and wife (4465). *Though a certificate of a copy of a record of a marriage license, properly made, may be admissible (30), it is not enough to allow the court to direct a verdict in favor of the marriage (31) and the jury may disbelieve the marriage regardless of the record of a certificate of a person of identical name (32). Nor is the marriage certificate itself conclusive evidence of marriage (33). Proof of a marriage in fact suffices in a bigamy prosecution without a marriage certificate (34).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. To be able to contract marriage, a person must not be laboring under the disability of nearness of relationship by blood or marriage (2931). Intermarriage of persons within the prohibited degrees of consanguinity or affinity is ground for total divorce (2945). Marriage of a person with a stepparent or stepchild, or with a spouse's parent, child, or grandchild is incestuous and prohibited (2932). *Penalty.* Marriage within the Levitical degrees of consanguinity[1] or within the degrees of affinity enumerated in §2932, is punishable by imprisonment for from one to three years (Pen. C. 371–a, S. 1922). *Intercourse of a stepfather with a stepdaughter is incest (35, 36, 37, 38) though the stepdaughter was the illegitimate daughter of the woman whom the man had married (36).*

[1] See Introduction, p. 10.

b. Proper Civil and Racial Status.—Marriage between white persons and persons of African descent is forever prohibited and shall be null and void (2941). *Prohibition of miscegenetic marriages is not violative of the contract clause of the federal Constitution, which does not concern marriage contracts (39). Penalty.* Persons living together or otherwise committing fornication shall be punished as for a misdemeanor (Pen. C. 372). [As to punishment, see Pen. C. 1065 under 1k.] *The marriage being by statute void, any sexual connexion thereunder would be punishable as fornication (40).* [As to penalty for issuing license for or celebrating such interracial marriages, see Pen. C. 678, under 1k and 2g.] [L. 1927, p. 272, makes felonious and void the intermarriage of a white person and a person with an ascertainable trace of African, West Indian, Asiatic Indian, or Mongolian blood; contains elaborate provision for discovery of race prior to marriage license issuance; and provides penalties. The act is not being enforced because of lack of appropriation.—G.M.]

c. Proper Legal Status.—To be able to contract marriage, a person must not be laboring under the disability of a previous marriage undissolved (2931). Marriages of persons unable to contract are void (2935). Any married person marrying another, knowing the lawful spouse to be living, shall be imprisoned in the penitentiary for from two to ten years, and the second marriage shall be void (Pen. C. 368). *The marriage of a person already married is void (21, 41, 42, 43, 44, 45, 46, 47, 48, 49) absolutely and without a decree of nullity (41, 48), and a spouse thereunder is no spouse at all (50, 51, 52). It has been held that children of a void bigamous marriage are to be considered legitimate until the marriage is judicially declared void (53). When one's prior subsisting marriage is lawful (54), one commits bigamy immediately upon marrying another, regardless of cohabitation (55, 56, 57) or of a prior marriage of the "spouse" by the bigamous marriage (58).*

Five years' absence and no information of the fate of a spouse is sufficient cause of acquittal in a bigamy prosecution (Pen. C. 369). *Such absence is a matter of defense to the prosecution (59). Neither spouse has a right to marry again, though believing the other dead, unless such belief is confirmed by five years' absence without information to the contrary (60) and, conversely, remarriage after proper absence is not concubinage but confers marital rights until the existence of the prior spouse is known and some steps for annulment taken (61). A marriage contracted after nine years' absence, even where no absence exception exists, will not be considered absolutely void to bastardize children (62).*

A total divorce annuls a marriage from the time of its rendition (2963). *Remarriage after a conditional decree of divorce granted in*

Alabama is adulterous (63) but may become a valid common law marriage by continued cohabitation after removal of the impediment (23). Formerly the remarriage of the guilty party was bigamous and voidable (64) and the jury might determine the parties' right of remarriage (65, 66).

The burden is on one attacking an actual marriage to prove its invalidity (27), as by showing the continued subsistence of a prior marriage (67). The presumption of validity of a second marriage overcomes the presumption of continued life of a former spouse, in the absence of corroborating facts (68). The presumption that cohabitation illicit in origin continues so is rebutted by evidence of matrimonial agreement and continued cohabitation thereunder (69).

d. Proper Consent of Parties.—To constitute an actual contract of marriage, the parties must consent voluntarily, without any fraud practiced upon either. Drunkenness at the time of marriage, brought about to induce consent, shall be held fraud (2933). *A misrepresentation known to the other party (71) or obvious to him is not fraud (70).* Inducement to marriage by force, menaces, duress, or fraud is ground for total divorce (2929). *The force constituting duress must be unlawful (71), and a man who marries the woman when under lawful arrest for seduction cannot have the marriage annulled either for fraud or for duress (70, 71, 72).* Marriages of persons unwilling or fraudulently induced to contract are void, unless a subsequent consent and ratification is voluntarily made, accompanied by cohabitation (2935). *A voidable marriage may be ratified by cohabitation (6, 7, 20).*

5. STATE SUPERVISION

No provision.

6. INTERSTATE RELATIONS

Marriages solemnized in another state by parties intending at the time to reside in this state shall have the same legal effect as if solemnized here, and residents of Georgia cannot evade its laws by going elsewhere for the solemnization of their marriage (2943). *The law of the place of contract, though generally governing marriage, will not be enforced if it involves anything immoral or contrary to the public policy or conscience of the domicil (39) or of the state called upon to give it effect (62). The effect of a marriage contracted elsewhere by persons under age, resident in Georgia, is judged by the law of Georgia (6).*

7. SEX OFFENSES AND MARRIAGE

A seduction prosecution may be stopped before arraignment and pleading by intermarriage of the parties or by bona fide offer of marriage by the seducer if at the time of obtaining license he gives bond for the support of the female and her children for five years; otherwise the prosecution will not be dismissed till he shall have lived with the female in good faith for five years (Pen. C. 379). *Prosecution for seduction may be stopped by marriage of the parties (71) or by an offer made before arraignment (73, 74), where the marriage license and bond are properly procured (75). But an offer made two years after seduction and after the woman has married another is no defense (76).* Prosecution for fornication may be suspended by intermarriage of the parties (Pen. C. 372). *And marriage after conviction precludes sentence and punishment thereunder (77).*

GEORGIA CASES

1. Askew v. Dupree, 30 G. 173 (1860). **2.** Southern Ry. Co. v. Brown, 126 G. 1 (1906). **3.** Minshew v. State, 25 App. 240 (1920). **4.** Carroll v. Wright, 131 G. 728 (1908). **5.** Brewer v. Kingsberry, 69 G. 754 (1882). **6.** Smith v. Smith, 84 G. 440 (1890). **7.** Crapps v. Smith, 9 App. 400 (1911). **8.** Powers v. Powers, 138 G. 65 (1912). **9.** Dunson v. State, 25 App. 172 (1920). **10.** Americus Gas and Electric Co. v. Coleman, 16 App. 17 (1915). **11.** Morgan v. Morgan, 148 G. 625 (1918). **12.** Luke v. Hill, 137 G. 159 (1911). **13.** Gibbs v. Brown, 68 G. 803 (1882). **14.** Cochran v. State, 91 G. 763 (1893). **15.** Buchanan v. Buchanan, 103 G. 90 (1897). **16.** Bell v. Bennett, 73 G. 784 (1884). **17.** Medlock v. Merritt, 102 G. 212 (1897). **18.** Brown v. Westbrook, 27 G. 102 (1859). **19.** Cale v. Davis, 135 G. 185 (1910). **20.** Stanley v. Stanley, 115 G. 990 (1902).

21. Clark v. Cassidy, Adm'r, 64 G. 662 (1880). **22.** Wynne v. State, 17 App. 263 (1915). **23.** Harper v. A. and W.P. Railroad Co., 33 App. 259 (1924). **24.** Dillon v. Dillon, 60 G. 204 (1878). **25.** Hill v. State, 41 G. 484 (1871). **26.** Scott v. State M.L. Insurance Co., 27 App. 93 (1921). **27.** Smith v. Reed, 145 G. 724 (1916). **28.** Hamilton v. Bell, 161 G. 739 (1926). **29.** Heflinger v. Heflinger, 161 G. 867 (1926). **30.** Smallwood v. Kimball, 129 G. 49 (1907). **31.** Green v. Scurry, 134 G. 482 (1910). **32.** Brown v. State, 16 App. 603 (1915). **33.** Fitzgerald v. Garvin, T.U.P.C. 281 (1810). **34.** Murphy v. State, 50 G. 150 (1873). **35.** Taylor v. State, 110 G. 150 (1900). **36.** Lipham v. State, 125 G. 52 (1906). **37.** Nephew v. State, 5 App. 841 (1909). **38.** Jennings v. State, 13 App.

678 (1913). **39.** State v. Tutty, 41 Fed. 753 (1890). **40.** Scott v. State, 39 G. 321 (1869).

41. Equitable Life Assurance Society v. Paterson, 41 G. 338, 364 (1870). **42.** Johnson v. State, 61 G. 305 (1878). **43.** Mitchell v. State, 63 G. 222 (1879). **44.** Clark v. Cassidy, Adm'r., 62 G. 407 (1879). **45.** Wrye v. State, 95 G. 466 (1894). **46.** Jeems v. State, 141 G. 493 (1914). **47.** Curlew v. Jones, 146 G. 367 (1917). **48.** Irving v. Irving, 152 G. 174 (1921). **49.** Pennaman v. Pennaman, 153 G. 647 (1922). **50.** Elverson v. Smith, 154 G. 324 (1922). **51.** Dickerson v. State, 30 App. 352 (1923). **52.** Murphy v. State, 122 G. 149 (1905). **53.** Perkins v. Levy, 158 G. 896 (1924). **54.** King v. State, 40 G. 244 (1869). **55.** Nelms v. State, 84 G. 466 (1889). **56.** McBride v. Graeber, 16 App. 240 (1915). **57.** Pitts v. State, 147 G. 801 (1918). **58.** Allen v. State, 17 App. 431 (1916). **59.** Robinson v. State, 6 App. 696 (1909). **60.** Parnell v. State, 126 G. 103 (1906).

61. Grand Lodge K. of P. v. Barnard, 9 App. 71 (1911). **62.** Eubanks v. Banks, 34 G. 407 (1866). **63.** Jackson v. State, 21 App. 823 (1918). **64.** Park v. Barron, 20 G. 702 (1856). **65.** Montfort v. Montfort, 88 G. 641 (1891). **66.** Atlanta v. Anderson, 90 G. 481 (1892). **67.** Ward v. Ward, 24 App. 695 (1920). **68.** Murchison v. Green, 128 G. 339 (1907). **69.** Drawdy v. Hesters, 130 G. 161 (1908). **70.** Owens v. Owens, 157 G. 397 (1924). **71.** Griffin v. Griffin, 130 G. 527 (1908). **72.** Cox v. Cox, 159 G. 862 (1925). **73.** Jinks v. State, 114 G. 430 (1901). **74.** Parker v. State, 17 App. 252 (1915). **75.** Banks v. State, 150 G. 73 (1920). **76.** Morris v. State, 14 App. 395 (1914). **77.** Cox v. Lanier, 133 G. 682 (1909).

IDAHO

REFERENCES: Compiled Statutes of Idaho (three volumes), 1919; Session Laws of Idaho, 1920 (extraordinary session), 1921, 1923, 1925, 1927; Reports through Volume 42.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Compiled Statutes and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Idaho section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Not directly required. [As to penalty for solemnizing marriage without presentation of license, see 2c.]

b. Issuer.—The county recorder of any county shall issue licenses to any applicants entitled to contract matrimony (4609). [Note: The clerk of the district court shall be ex-officio auditor and recorder (3543).]

c. Compensation of Issuer.—The recorder is entitled to demand a fee of $3.00 from the applicant for a license (4616), all of which fees above expenses he shall pay into the county treasury, county officers receiving fixed annual salaries as exclusive compensation (Const. Art. XVIII, §7). *All statutory fees coming to county officers by virtue of office shall be turned over (1). Penalty.* Neglect to pay any fees into the county treasury is a felony (Const. Art. XVIII, §9), punishable by imprisonment not exceeding five years, fine not exceeding $5000, or both (8085).

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—[No statutory provision as condition to license issuance. As to common law ages for marriage, see Introduction, page 9.] Where a party was under the age of legal consent and has

not freely cohabited after attaining such age, marriage without parental consent may be annulled on action by the minor within four years after attaining the age of consent, or by a parent or guardian at any time before the minor reaches such age (4620; 4621).

g. Parental Consent.—Although unmarried persons of eighteen years or upward are capable of consenting to marriage, license shall not be issued to parties under eighteen without the written consent, duly acknowledged or sworn to, of the father, mother, or guardian, if any (4592, as amended L. 1921, ch. 221).

h. Mental and Physical Qualifications.—[No statutory provision as condition to license issuance.] A marriage may be annulled before the death of either party if either party was of unsound mind and there was no cohabitation after coming to reason, or if either party is incapable from physical causes (4594).

i. Form of License.—The license, addressed to any authorized officiant, has blanks for the names and addresses of the parties and requires the officiant to return the certificates attached (4609).

j. Record of License.—No provision.

k. Other Provisions.—The recorder shall issue license if he has personal knowledge of the competency of the parties; if not, he shall take the affidavit of the applicant and of other persons as he may see proper, and it appearing from such affidavits that the parties are legally competent he shall issue license, the affidavits being his warrant against fine (4611). *Penalties.* For issuing license to parties not legally competent the recorder shall be fined $100 (4611). False swearing in an affidavit to any material fact as to the competency of any person for marriage is perjury (4612), punishable by imprisonment for from one to fourteen years (8168).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by justices of the supreme court, district or probate judges, the Governor, justices of the peace, and mayors, and by priests or ministers of any denomination (4602).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—Any authorized officiant receiving a duly issued license and not having personal knowledge of the incom-

petency of either party may lawfully solemnize matrimony (4613). *Penalty.* For solemnizing marriage without a license the officiant shall be fined from $50 to $200 (4614).

d. Form of Ceremony.—Though no particular form is required, the parties must declare in the presence of the officiant that they take each other as husband and wife (4603). [Note: The certificate annexed to the license contains blanks for the names of two witnesses (4610).]

e. Common Law Marriage.—Marriage must be solemnized, authenticated, and recorded as provided, but non-compliance does not invalidate any lawful marriage (4600). *Common law marriages are valid and binding (2). Marriage is a civil contract valid without ceremony, in the absence of a statute to the contrary, and may be presumed from cohabitation as husband and wife (3). Cohabitation under a marriage contracted in good faith by one party during the existence of an impediment to the marriage of the other, if continued after removal of the impediment, raises the presumption of a marriage between the parties contracted after removal of the impediment which rendered the original marriage void (2).*

f. Irregular Solemnization.—The validity of a marriage solemnized before any person professing to be an authorized officiant shall not be affected by any want of authority in such person if the marriage was consummated with the belief of the parties, or either of them, that they were lawfully married (4607). *Penalty.* See 8470 under 2g.

g. Other Provisions.—All authorized officiants must ascertain: (1) the identity of the parties; (2) their names and residence; (3) that they are of sufficient age; (4) that consent of the father, mother, or guardian, if any, is given for parties under eighteen years and not previously married; and that the parties have a legal right to marry (4601). The officiant may administer oaths and examine the parties and witnesses to satisfy himself that the parties are qualified (4604). *Penalties.* Any officiant solemnizing marriage knowing either party is legally incompetent shall be fined from $50 to $200 (4614). Solemnizing or pretending to solemnize marriage when not authorized, or when knowing any legal impediment, is a misdemeanor (8470), punishable by imprisonment not exceeding six months, fine not exceeding $300, or both (8086). [Note: The officiant is entitled to receive $5.00 for solemnizing marriage, but may receive any greater

sum (4606). *Any gratuitous fee over the statutory amount may be retained by an officiant even though he be a salaried county officer (1).*]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant must give each of the parties, if required, a certificate of marriage (4605). The officiant shall return the license and certificate, duly executed, to the issuer within thirty days (4610). *Penalties.* For neglect to make such return, the officiant shall be fined from $20 to $50 (4610), and for wilfully making a false return he shall be fined not less than $500 and imprisoned for not less than three months (4618).

All officiants must keep a register of the time and place of each marriage, the residence, names, birthplace, and age of each party, and whether either has been married, and if so, whether divorced (1649), certified copies of such register to be filed quarterly with the county recorder (1650). *Penalty.* Any person failing to perform as required shall be fined not exceeding $50, imprisoned not exceeding ninety days, or both (1654).

b. Local Record.—The recorder within one month after receipt shall record all returns of licenses (4615). *Penalties.* For neglect to record any return within such time the recorder shall forfeit $100, to be recovered with costs by any person prosecuting for the same (4615); for wilfully recording a false return he shall be fined not less than $100 or imprisoned for not less than three months (4618). The recorder must enter and index in a register marriages certified to him, stating the various facts contained in the certificates, and carefully examining each report and registering the same marriage but once (1651). *Penalty.* See 1654 under 3a.

c. State Record.—The county recorder every three months must transmit to the Department of Public Welfare at Boise a certified abstract of the marriage register, prepared as prescribed by the department upon blanks furnished by it (1652). [The abstract prescribed in practice calls for the names and other facts concerning the parties married.—G.M.] *Penalty.* See 1654 under 3a.

d. Evidence.—The original certificate and record, and record thereof by the recorder or certified copy of such record, shall be presumptive evidence of the marriage (4608; 4817). Consent to and consummation of marriage may be manifested in any form and may be proved under the same rules of evidence as facts in other cases (4593). On trial for bigamy the marriages may be proved by such

evidence as is admissible to prove marriage in other cases without a certificate or other record evidence thereof (8953). *Application for license and certificate of marriage are admissible to prove the marriage in a bigamy prosecution (4). Absence of record does not disprove a marriage where the parties have changed their name (5).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Such forbidden marriages (except between cousins) are incestuous and void from the beginning (4595). Marriages between first cousins are prohibited (4596, as amended L. 1921, ch. 115). *Penalty.* Persons who intermarry within the degrees of consanguinity within which marriages are declared incestuous and void are punishable by imprisonment not exceeding ten years (8286). [This does not include first cousins. —G.M.]

b. Proper Civil and Racial Status.—Marriages hereafter contracted of white persons with Mongolians, Negroes, or mulattoes are illegal and void (4596, as amended L. 1921, ch. 115). *Penalty.* Persons cohabiting when not married are guilty of a misdemeanor (8289), punishable by imprisonment not exceeding six months, fine not exceeding $300, or both (8086). [Miscegenetic marriages being void, cohabitation thereunder would be criminal.—G.M.]

c. Proper Legal Status.—A subsequent marriage contracted by a person during the life of a former spouse is illegal and void from the beginning unless the former marriage has been annulled or dissolved more than six months, or unless the former spouse was absent and not known to such person to be living for five successive years immediately preceding, or was generally reputed and believed by such person to be dead, in which cases the subsequent marriage is valid until adjudged null (4597). *Penalty.* Every person having a living spouse who marries another, and any man who simultaneously or on the same day marries more than one woman, shall be fined not exceeding $2000 and imprisoned in the penitentiary for not more than five years, or shall be fined not less than $200 and imprisoned in jail not exceeding six months, except where the spouse has been absent for five successive years and not known to the person marrying again to be living, or where the former marriage has been dissolved or declared void by a valid decree (8283). *Plural marriages only during this life are forbidden and not all "celestial marriages" of the Mormon creed (6). Though a marriage within six months after*

divorce be itself illegal and void, not so a promise to marry at the expiration of such period (7). A presumption of a previous divorce from a prior marriage may be indulged in support of the validity of a later marriage (2), which can be disproved only by convincing proof of subsistence of the prior marriage (8).

d. Proper Consent of Parties.—Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of contracting is necessary (4591). *Penalty.* False personation of another, and marriage or pretense of marriage in such assumed character, with or without the connivance of such other, is a felony (8469), punishable by imprisonment not exceeding five years, fine not exceeding $5000, or both (8085).

If the consent of either party is obtained by fraud or force the marriage may be annulled if not followed by voluntary cohabitation (4594; 4620). *Penalty.* Every person taking any woman unlawfully, against her will, and compelling her to marry him or another person shall be imprisoned from two to fourteen years (8266).

5. STATE SUPERVISION

The State Department of Public Welfare shall furnish blanks and prescribe the form of abstract of the marriage register transmitted to it by the county recorder (1652).

6. INTERSTATE RELATIONS

Marriages valid where contracted are valid in this state (4599). *A marriage by written contract in Utah, declared valid there, confers marital rights in Idaho (9).*

IDAHO CASES

1. Rhea v. County Commissioners, 12 I. 455 (1906); rehearing, 13 I. 59. **2.** Huff v. Huff, 20 I. 450 (1911). **3.** Dawson v. U.S., 10 Fed. (2d) 106 (1926); certiorari denied, 271 U.S. 687. **4.** State v. Martinez, 250 Pac. 239 (1926). **5.** Labonte v. Davidson, 31 I. 644 (1918). **6.** Toncray v. Budge, 14 I. 621 (1908). **7.** Harpold v. Doyle, 16 I. 671, 694 (1909). **8.** Smith v. Smith, 32 I. 478 (1919). **9.** Hilton v. Stewart, 15 I. 150 (1908).

ILLINOIS

REFERENCES: Revised Statutes of Illinois (Cahill), 1925; Laws of Illinois, 1927; Reports through Volume 323 Illinois and 241 Appellate.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to chapters and paragraphs of the Revised Statutes. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Illinois section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Persons intending to be joined in marriage, before their marriage shall obtain a license (ch. 89, ¶6). Quakers may be lawfully married by making known their intention to a standing committee of any official meeting at least one week before consummation of marriage (ch. 89, ¶4). [The requirement is mandatory, though formerly not so. See 2e.]

b. Issuer.—License is obtained from the county clerk of the county where the marriage is to take place (ch. 89, ¶6). [Note: The terms "county clerk" and "clerk of the county court" are interchangeable (ch. 131, ¶1).] *The fact that the issuer signed as "clerk of the county court" does not affect the validity of the license* (*1*).

c. Compensation of Issuer.—The total fee of the county clerk for license issuance is $1.00 in counties of the first and second classes (ch. 53, ¶31) and $3.00 in counties of the third class (ch. 53, ¶69). The clerks of all courts of record of Cook County shall receive as exclusive compensation fixed salaries, paid from the fees collected, all fees above the amount of said salaries being paid into the county treasury (Const. 1870, Art. X, §9), and in other counties the county board fixes the compensation (with stipulated maxima) to be paid out of and not to exceed the fees collected (Const. 1870, Art. X, §10).

d. Personal Appearance by Candidates.—One of the parties to the contemplated marriage must be the applicant for the license (ch. 89, ¶6). [See this paragraph under 1k.] *It is a wise policy to require examination in person rather than affidavits* (*2*).

e. Advance Notice and Objections.—No provision as condition to license issuance. [As to Quakers making known their intentions, see ch. 89, ¶4, under 1a.]

f. Minimum Age.—[No provision as specific condition to license issuance. See ch. 89, ¶6 and ¶13 under 1k.] Males of eighteen and females of sixteen years may contract a legal marriage (ch. 89, ¶3). To ascertain the age of the parties the county clerk may examine them or other witnesses under oath (ch. 89, ¶8). *The statute fixing a minimum age for marriage raises the common law age of consent, and marriages contracted below such age are voidable if not ratified by cohabitation after attaining it (3, dictum). But if an under-age marriage is absolutely void where contracted, it is void here (4, 5). Though minors over the age of consent may enter a valid marriage contract, they are not liable on an executory contract to marry (6).*

g. Parental Consent.—Males of twenty-one and females of eighteen years may contract marriage, and males of eighteen and females of sixteen may also contract marriage if the parent or guardian appear before the county clerk in the county where the minor resides and make affidavit of parentage or guardianship, of date and place of birth and residence of the minor, and give consent to the marriage, submitting such proofs of the minor's age as the county clerk may deem necessary (ch. 89, ¶3). [As to affidavit of age, see ch. 89, ¶6, under 1k; and as to penalties for false affidavit and mis-issuance, see ch. 89, ¶¶6 and 13, under 1k.] *A marriage over the minimum age contracted without parental consent is valid, in absence of a statute declaring its nullity, regardless of penalties on the license issuer and officiant (3, 7, 8, 9, 10). A wrong name given to the clerk may prevent him from knowing the party's parentage and free him from liability for issuance without parental consent (11).*

h. Mental and Physical Qualifications.—No insane person or idiot shall be capable of contracting marriage (ch. 89, ¶2). *When application is made to the county clerk to issue a license to persons to marry, it becomes his duty to inquire into everything affecting the competency of the parties applying for the license to enter into such relation (12).* [As to penalty for mis-issuance, see ch. 89, ¶13, under 1k.] *Though perhaps the same degree of mental strength is not necessary to contract marriage as is required to enter into a business transaction (13), the marriage of a person whose capacity is so impaired as to make him unable to understand the nature and effect of the act of marriage (14), or of an insane person, is void ab initio and may be attacked collaterally (15). But*

intoxication at the time of marriage renders the marriage voidable only and not void (16); epilepsy does not make impossible the performance of the duties of marriage or render its assumption dangerous (17); an occasional paroxysm of hereditary insanity prior to and not at the time of marriage does not constitute mental incapacity (18); and adjudication of insanity is only prima facie evidence of the person's subsequent incapacity to contract marriage and is not conclusive (19). Though mentality is low the chancellor's finding of sanity renders the marriage valid (20).

[Note: The injured party who has been infected by the other with a communicable venereal disease may obtain a divorce (ch. 40, ¶1).]

Though where a woman is to be mother of a child by another man at the time of marriage, unknown to her husband, annulment may be granted, not so if the husband, unknown to the wife, is to be father of a child by another woman, for there is no incapacity to procreate and no confusion of property rights within the family (21).

i. Form of License.—The license sets forth the names, residence, and age of the parties, and where either party is under the prescribed age of twenty-one or eighteen years respectively, the fact of parental consent (ch. 89, ¶7).

j. Record of License.—No provision.

k. Other Provisions.—To ascertain the age of the parties and the legality of the marriage the county clerk shall obtain an affidavit from the applicant (who must be one of the parties to the contemplated marriage) and, if he deems proper, from both parties and other persons (ch. 89, ¶6). *In order to avoid penalty the clerk must inquire as to everything affecting the competency of the parties to contract marriage (12), but when the evidence produced by such examination fairly tends to prove competency, and the clerk so decides, then, though the decision is erroneous, he is protected (2). The penalty is incurred by the principal clerk for mis-issuance of a license by his deputy without the required examination (22).*

Before issuing a license to a resident of another state, who intends to remain so resident, the official shall satisfy himself by requiring affidavits or otherwise that such person's marriage is not prohibited by the laws of the state of his residence (ch. 89, ¶22). *Penalty.* An official knowingly issuing a license to parties thus prohibited from marrying is guilty of a misdemeanor (ch. 89, ¶23), punishable by a fine not exceeding $100, imprisonment not exceeding six months, or both (ch. 38, ¶615).

Penalties. A county clerk knowingly issuing a license for the marriage of persons legally incapable of contracting marriage is punishable by fine of from $100 to $500 for each offense (ch. 89, ¶13). All persons making false affidavits as to material matters, thus inducing the issuance of a license for the marriage of parties legally incapable, are punishable by fine of from $100 to $1000, imprisonment not exceeding one year, or both (ch. 89, ¶6).

2. SOLEMNIZATION

a. Officiant.—Marriage may be celebrated by a minister of the gospel in regular standing, a judge of any court of record, a justice of the peace, or by any superintendent of a public institution for the deaf and dumb in Illinois, among Quakers before the official witnesses of the body (ch. 89, ¶4), and among members of any religious society according to the rules of such society (ch. 89, ¶5). *A justice of the peace, holding the required position, may solemnize marriages even though deprived of judicial powers in a metropolitan area (3).*

b. Officiant's Credentials.—No provision.

c. Presentation of License.—The license permits the marriage of the persons named (ch. 89, ¶7). *Penalty.* An authorized officiant celebrating a marriage without a license first having been obtained therefor—except in case of Quakers whose intentions have been published—shall forfeit for every offense $100, to be recovered in a civil action (ch. 89, ¶15) prosecuted by the state's attorney of the proper county (ch. 89, ¶17).

d. Form of Ceremony.—[No general statutory provision.] Quakers may be lawfully married by making known their intention to a committee and by appearing before official witnesses of any meeting, one of whom shall publicly read a certificate signed by the parties setting forth the name and residence of each, and of their parents if living, which shall afterwards be recorded upon the records of an organized meeting of the society (ch. 89, ¶4). Persons belonging to any religious society may celebrate their marriage according to the rules of such society (ch. 89, ¶5).

e. Common Law Marriage.—Common law marriages contracted after 1905 are null and void unless parties so married obtain a license and go through a ceremony as prescribed, which license and solemnization legitimate children of common law marriages (ch. 89, ¶4). *Prior to 1905 in absence of a nullity clause in the statute, a marriage*

without observance of requirements was valid if valid at common law (19, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37). Though no particular form of words was necessary to constitute a common law contract of marriage (38), both parties had to consent to contract (39) as well as assume the marriage relation (40, 41, 42), understanding it to be in place of a ceremonial marriage (43). A contract per verba de praesenti *was sufficient (23), or a contract* per verba de futuro cum copula *if there was a present understanding that the copula was connected with the previous promise of marriage (23, 44, 45). Although evidence of conduct, acknowledgment, and repute may establish a common law marriage without proof of the contract itself (19), cohabitation under a supposedly valid but in fact void ceremonial marriage is not sufficient (46), cohabitation and repute do not adequately prove a common law marriage in a bigamy prosecution (47), and such evidence of marriage may be rebutted by showing the relation to be meretricious (48).*

Where both parties contracted marriage in the honest and reasonable belief that they were capable of so contracting, and in fact one was not, if they continued to cohabit after removal of the impediment, in absence of contrary evidence the law will presume a common law marriage (30, 32), at least if the parties cohabited knowing of the removal of the impediment (29, 49). Not so if one of the parties married originally in bad faith knowing his disability (25), and possibly not if the parties did not intend a common law marriage (46) [though this seems contrary to the earlier decisions.—G.M.].

f. Irregular Solemnization.—*Penalty.* A person celebrating a marriage when not authorized by law is punishable by fine not exceeding $500 and imprisonment not exceeding two years (ch. 38, ¶235).

g. Other Provisions.—*Penalty.* An authorized officiant knowingly solemnizing a marriage of a person residing in another jurisdiction and intending to continue so resident, forbidden by the laws of his residence to marry, shall be guilty of a misdemeanor (ch. 89, ¶23), punishable by a fine not exceeding $100, imprisonment not exceeding six months, or both (ch. 38, ¶615).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant, or if no officiant the clerk of the church, within thirty days after marriage shall return the license and a certificate to the clerk of the county where the marriage took place (ch. 89, ¶9). The officiant or clerk of the church having

such duty who shall fail to make the return as provided shall forfeit $100, to be recovered in a civil action (ch. 89, ¶16) prosecuted by the state's attorney of the proper county (ch. 89, ¶17). [As to records of Quaker marriages, see ch. 89, ¶4, under 2d.]

b. Local Record.—The county clerk receiving the certificate shal make and preserve a registry containing the names of the parties and of the person certifying the marriage, the time of marriage and of filing the certificate (ch. 89, ¶11), which record books shall always be open to inspection (ch. 65a, ¶5). *Penalty.* A clerk whose fee has been paid, failing to register the marriage certificate for more than thirty days after its return, shall forfeit $100 to be recovered in a civil action by the party injured (ch. 89, ¶14).

c. State Record.—County clerks are required to render a complete report of all marriages to the secretary of the State Board of Health annually and at such other times as the board may direct (ch. 65a, ¶5).

d. Evidence.—The certificate of marriage, a copy, or a certified copy of the entry in the clerk's registry shall be received as evidence of the marriage (ch. 89, ¶12). *Though a properly authenticated copy of a marriage license and certificate is admissible even in criminal prosecutions (50), not so a mere statement of a county clerk certifying that a marriage has been performed and a return filed (51). Foreign records are admissible only if the law of the place made their keeping an official duty (52, 53, 54) and if the parties are identified (53), and similarly as to unofficial church records (55, 56). Lack of a record of marriage may be overcome by testimony as to the fact of marriage (57). A marriage certificate is sufficient with other evidence, such as cohabitation as husband and wife (58), to prove a marriage (59).* A foreign marriage may be proved by acknowledgment of the parties, their cohabitation, and other circumstantial testimony (ch. 40, ¶12). *Although in civil cases the exact words of a foreign church ceremony need not be shown (60), a foreign certificate is not admissible in proof of either an actual ceremony or of the officiant's character (61).* Either marriage in a bigamy prosecution may be proved without record evidence by such evidence as is admissible to prove marriage in other cases (ch. 38, ¶54).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Marriages within the forbidden degrees are incestuous and void (ch. 89, ¶1). *Penalty.* Persons marrying within the incestuous degrees shall be imprisoned

for from one to ten years (ch. 38, ¶357), and shall be rendered forever incapable of holding an office of honor, of voting, or of serving as a juror (ch. 38, ¶616). *Though formerly marriages within the Levitical degrees*[1] *were voidable only (62), now a marriage within the prohibited degrees, if contracted in Illinois, is void absolutely, subject to collateral attack (63), and punishable criminally (64). The marriage elsewhere of first cousins, valid where contracted, will be recognized here (65). The marriage of a man with the daughter of his half-sister is within the forbidden degrees (63).*

b. Proper Civil and Racial Status.—No statutory provision. *A statute prohibiting interracial marriages must be clearly proved to make invalid an otherwise lawful marriage (66) and cannot affect the validity of a marriage contracted before its enactment (67).*

c. Proper Legal Status.—The injured party may obtain a divorce where the other had a spouse living at the time of marriage (ch. 40, ¶1). *Inasmuch as a married person has no capacity to contract another marriage (25, 44, 68), the marriage of a person already married is void (69, 70, 71, 72, 73, 74, 75), confers no property rights (71), and does not prevent the testimony of a person against a supposed spouse under such void marriage (72, 76). Consequently a marriage after a void bigamous marriage is valid (46, 69).* A person having a former spouse living, who marries another person or who continues to cohabit with such second spouse in this state, is punishable by imprisonment for from one to five years and fine not exceeding $1000—and shall be rendered forever incapable of holding an office of honor, of voting, or of serving as a juror (ch. 38, ¶616)—but this does not extend to a person whose spouse has been continually absent for five successive years prior to the second marriage and not known to the person marrying to be living within that time, or to a person divorced, or whose marriage has been declared void (ch. 38, ¶53). *A prior marriage supports a bigamy prosecution even though voidable (16) or contracted under the erroneous belief that a divorce had been previously granted (77).*

Until 1923 a statute forbade and made void remarriage within a period of one or two years after divorce (12, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92). Although the presumption of the validity of a marriage in fact puts on one attacking it the burden of proving its invalidity (24, 73, 93, 95), the presumption is overcome by adequate evidence of invalidity (60, 96, 97).

[1] See Introduction, p. 10.

d. Proper Consent of Parties.—*Where the act of marriage was intended, a collateral agreement that there was to be no consummation does not show lack of matrimonial intention (98). Penalty.* Marrying a person under false personation is punishable by imprisonment of from one to ten years (ch. 38, ¶237). *Regardless of absence of a statute, an equity court will annul an unconsummated marriage procured by fraud (99) going to the essence of the relation but not including misrepresentation as to profundity of religious interest (100), or concealment of epilepsy (17), or probable paternity of a child by another woman (21).* [*As to unknown pregnancy, see* 1h.] *Illegal arrest is not necessarily duress which, to allow of annulment, must suffice to overcome a will of ordinary firmness (101). Cohabitation after discovery of a ground for annulment may constitute ratification (17).*

5. STATE SUPERVISION

The State Board of Health shall prepare forms for the record of marriages to be furnished to county clerks and by them to persons required to make reports (ch. 65a, ¶6). [As to prosecutions by state's attorney, see ch. 89, ¶17, under 2c and 3a.]

6. INTERSTATE RELATIONS

If a resident of this state, intending to remain so resident, contracts in another jurisdiction a marriage prohibited and declared void by the law of this state, such marriage is void in this state (ch. 69, ¶20). A marriage contracted in this state by a resident of another jurisdiction, intending to remain so resident, is void in this state if it would be void if contracted in such other jurisdiction (ch. 89, ¶21). [As to penalties for license issuance and solemnization, see ch. 89, ¶¶22 and 23, under 1k and 2g.]

The general rule is that the law of the place where the marriage is contracted governs its validity (4, 7, 65, 89, 91), regardless of the law of the country of citizenship (102): if valid there it is valid everywhere (103); if invalid there it is invalid everywhere (5, 78, 104). But marriages contrary to the Christian law of nature or the positive law of the parties' domicil, though valid where contracted, are not recognized as valid (78, 80, 84, 90, 92), at least if the parties intended to evade the law of their domicil and not actually to change domicils (85, 89). Under the Evasions Act for a valid out-of-state marriage to be invalid here it must be "prohibited and declared void" by Illinois law and not be merely in violation of some statutory requirement like that of parental consent (8, 10).

7. SEX OFFENSES AND MARRIAGE

Subsequent intermarriage of the parties bars prosecution for fornication (ch. 38, ¶23); for seduction of an unmarried female under eighteen (ch. 38, ¶557); and for rape, if the marriage precedes conviction (ch. 38, ¶505). Marriage is not a defense to the crime of pandering (ch. 38, ¶478).

ILLINOIS CASES

1. Tucker v. People, 122 I. 583 (1887). **2.** Gilbert v. Bone, 64 I. 518 (1872); rehearing, 79 I. 341 (1875). **3.** Matthes v. Matthes, 198 App. 515 (1916). **4.** McDeed v. McDeed, 67 I. 545 (1873). **5.** Canale v. People, 177 I. 219 (1898). **6.** McConkey v. Barnes, 42 App. 511 (1891). **7.** Reifschneider v. Reifschneider, 241 I. 92 (1909); affirming 144 App. 119 (1908). **8.** People ex rel. Mitts v. Ham, 206 App. 543 (1917). **9.** People v. Reynolds, 217 App. 577 (1920). **10.** Schwartz v. Schwartz, 236 App. 336 (1925). **11.** Campbell v. Beck, 50 I. 171 (1869). **12.** Olsen v. People ex rel. Buenger, 219 I. 40 (1905). **13.** Hagenson v. Hagenson, 258 I. 197 (1913). **14.** Pyott v. Pyott, 191 I. 280 (1901); affirming 90 App. 210 (1899). **15.** Orchardson v. Cofield, 171 I. 14 (1898). **16.** Barber v. People, 203 I. 543 (1903). **17.** Lyon v. Lyon, 230 I. 366 (1907); affirming Lyon v. Barney, 132 App. 45. **18.** Hamaker v. Hamaker, 18 I. 137 (1856). **19.** Davis v. Tickell, 230 App. 285 (1923). **20.** McConnell v. Brown, 232 I. 336 (1908).

21. Hull v. Hull, 191 App. 307 (1915). **22.** Hilboldt v. Caraker, 41 App. 595 (1891). **23.** Port v. Port, 70 I. 484 (1873). **24.** Harris v. Harris, 8 App. 57 (1880). **25.** Cartwright v. McGown, 121 I. 388 (1887). **26.** Bowman v. Bowman, 24 App. 165 (1887). **27.** Elzas v. Elzas, 171 I. 632 (1898); 72 App. 94. **28.** Hutchinson v. Hutchinson, 96 App. 52 (1900); affirmed, 196 I. 432 (1902). **29.** Robinson v. Ruprecht, 191 I. 424 (1901). **30.** Manning v. Spurck, 199 I. 447 (1902). **31.** Alden v. Church, 106 App. 347 (1902). **32.** Land v. Land, 206 I. 288 (1903); affirming 108 App. 131. **33.** Marks v. Marks, 108 App. 371 (1903). **34.** Heymann v. Heymann, 218 I. 636 (1905). **35.** Lavery v. Hutchinson, 249 I. 86 (1911). **36.** Lesher v. Lesher, 159 App. 432 (1911); reversed, 250 I. 382. **37.** Young v. Young, 213 App. 402 (1918–19). **38.** Herald v. Moker, 257 I. 27 (1912). **39.** Pike v. Pike, 112 App. 243 (1904). **40.** McKenna v. McKenna, 180 I. 577 (1899); 73 App. 64.

41. Hooper v. McCaffery, 83 App. 341 (1898). **42.** Robinson v. Robinson, 188 I. 371 (1900). **43.** Baird v. People ex rel. Wenderlandt, 66 App. 671 (1896). **44.** Hebblethwaite v. Hepworth, 98 I.

126 (1881). **45.** Stoltz v. Doering, 112 I. 234 (1885). **46.** People v. Shaw, 259 I. 544 (1913). **47.** Hiler v. People, 156 I. 511 (1895). **48.** In re Estate of Maher, 204 I. 25 (1903). **49.** Stein v. Stein, 66 App. 526 (1896). **50.** Jackson v. People, 3 I. 231 (1840). **51.** Ewing v. Cox, 158 App. 25 (1910). **52.** Tucker v. People, 117 I. 88 (1886). **53.** Sokel v. People, 212 I. 238 (1904). **54.** Dailey v. Grand Lodge, 311 I. 184 (1924). **55.** Groom v. Parables, 28 App. 152 (1888). **56.** Murphy v. People, 213 I. 154 (1904). **57.** T. W. and W. Railway Co. v. Brooks, 81 I. 245 (1876). **58.** Aldrich v. Aldrich, 287 I. 213 (1919). **59.** Smith-Lohr Coal Co. v. Industrial Comm., 286 I. 34 (1918). **60.** Resnick v. Resnick, 126 App. 132 (1906). **61.** McArthur v. Hopson, 184 App. 487 (1914). **62.** Bonham v. Badgley, 7 I. 622 (1845). **63.** Williams v. McKeene, 193 App. 615 (1915). **64.** Arado v. Arado, 281 I. 123 (1917); affirming 205 App. 261. **65.** People ex rel. Schutt v. Siems, 198 App. 342 (1916). **66.** Laurence v. Laurence, 164 I. 367 (1896). **67.** Illinois Land and Loan Co. v. Bonner, 75 I. 315 (1874). **68.** Drennan v. Douglas, 102 I. 341 (1882). **69.** Reeves v. Reeves, 54 I. 332 (1870). **70.** Gordon v. Gordon, 141 I. 160 (1892). **71.** Brown v. Brown, 142 I. 409 (1892). **72.** Clark v. People, 178 I. 37 (1899). **73.** Potter v. Clapp, 203 I. 592 (1903). **74.** Duenser v. Royal Arcanum, 262 I. 475 (1914). **75.** Crittenden v. Hindman, 271 I. 577 (1916). **76.** Hoch v. People, 219 I. 265 (1905–06). **77.** People v. Spoor, 235 I. 230 (1908). **78.** Nehring v. Nehring, 164 App. 527 (1911). **79.** Szlauzis v. Szlauzis, 255 I. 314 (1912). **80.** Wilson v. Cook, 256 I. 460 (1912).

81. People v. Prouty, 262 I. 218 (1914). **82.** Snell v. Snell, 191 App. 239 (1915). **83.** Rand v. Bogle, 197 App. 476 (1916). **84.** People v. Schmutz, 198 App. 108 (1916). **85.** Nelson v. Nelson, 200 App. 584 (1916). **86.** Hunt v. Hunt, 201 App. 615 (1916). **87.** Hobbs v. Hobbs, 279 I. 163 (1917). **88.** Kahlo v. Kahlo, 204 App. 409 (1917). **89.** Powell v. Powell, 207 App. 292 (1918); affirmed, 282 I. 357. **90.** Lincoln v. Riley, 217 App. 571 (1920). **91.** Lehmann v. Lehmann, 225 App. 513 (1922). **92.** Stevens v. Stevens, 304 I. 297 (1922). **93.** Jones v. Gilbert, 135 I. 27 (1890). **95.** Senge v. Senge, 106 App. 140 (1903). **96.** Schmisseur v. Beatrie, 147 I. 210 (1893). **97.** Cole v. Cole, 153 I. 585 (1894). **98.** De Vries v. De Vries, 195 App. 4 (1915). **99.** Lyndon v. Lyndon, 69 I. 43 (1873). **100.** Beckley v. Beckley, 115 App. 27 (1904). **101.** Schwartz v. Schwartz, 29 App. 516 (1888). **102.** Roth v. Roth, 104 I. 35 (1882); writ denied, 107 U.S. 319. **103.** Acklin v. Employee's Benefit Association, 222 App. 369 (1920). **104.** Simonds v. Allen, 33 App. 512 (1889).

INDIANA

REFERENCES: Burns' Annotated Indiana Statutes (three volumes and index), 1926; Laws of Indiana, 1927; Reports through Volume 197 Indiana and 84 Appellate.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Annotated Statutes. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Indiana section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Before any persons, except members of the Society of Friends, shall be joined in marriage, they shall produce a license (9869). *In general the requirement for a marriage license is directory only in absence of a provision declaring non-compliance with the statute to constitute nullity (1), and failure to obtain a license does not render the marriage void (2).*

b. Issuer.—License is procured from the clerk of the circuit court of the county in which the female resides (9869). [The Attorney General has stated that there is no authority to issue licenses for the marriage of non-resident females.—G.M.]

c. Compensation of Issuer.—The fee of clerks of circuit courts for issuing, recording, and indexing each marriage license with affidavits, and recording the marriage certificate, is $2.00, which is the property of the county (7876), the clerks receiving as exclusive compensation a statutory salary graded in proportion to the population and services required in the several counties (7738).

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—[No provision as to advance notice.] The right to a license not appearing, the clerk shall refuse to issue the same and immediately, without formality or expense to the applicants, shall certify the proceedings to the circuit court, where the application shall be heard at the earliest practicable time by the circuit judge without a jury, whose finding as to issuance shall be final (9876).

f. Minimum Age.—[No statutory provision as specific condition to license issuance.] Males of eighteen and females of sixteen years are capable of entering into the marriage contract (9859). *Penalty.* See 9872 under 1k. Where either party shall be incapable from want of age of contracting marriage, it may be declared void on the application of the incapable party (9864). *Though the marriage of a girl of sixteen years is not voidable for want of parental consent, youth is a relevant consideration in relation to incapability to resist fraud (3).*

g. Parental Consent.—If the female be under eighteen or the male under twenty-one years, license shall not issue without the consent of the parent or guardian, if there be one within the state, or without the state unless the female has resided in the county of application for one month preceding (9870). An affidavit as to such facts by some disinterested person is sufficient justification of the clerk in issuing a license (9871). *Penalties.* See 9872, 9878 under 1k. *In respect to marriage a female of eighteen is really an adult and can execute a binding release from a contract to marry (4).*

h. Mental and Physical Qualifications.—No license shall issue where either party is imbecile, epileptic, of unsound mind or under guardianship as a person of unsound mind, afflicted with a transmissible disease, or, at the time of making application, is under the influence of an intoxicating liquor or narcotic drug (9875). *Penalties.* See 9878, 9880 under 1k. A marriage is void when either party is insane or idiotic at the time of such marriage (9862). *Though the marriage of an insane person is absolutely void and not subject to ratification (5), its validity cannot be collaterally attacked by heirs (6), and an allowance after decree for support of the supposed spouse may not be improper (7).* A marriage where either party shall be incapable from want of understanding of contracting such marriage may be declared void on application of the incapable party (9864). *The incapacity allowing of annulment must exist at the time of marriage (8), and action can be brought by the incapable party only (8, 9). Long-continued cohabitation may show ratification by a person previously adjudged of unsound mind (10) or may raise a presumption of a new contract of marriage by a person previously insane (5).*

i. Form of License.—The license, directed to any authorized officiant, authorizes him to join in marriage the persons named (9869).

j. Record of License.—Marriage license applications shall be recorded by the clerk in a book which shall be a public record (9873).

Penalty. See 9880 under 1k. *The clerk must keep a record of licenses issued (11).*

k. Other Provisions.—No license shall issue except upon written and verified application containing a statement of the full name, color, occupation, birthplace, and residence of the parties and their parents, and ages of the parties, number of marriage, and such other facts as may be necessary to determine whether any legal impediment to the proposed marriage exists. Though members of the Old Amish Mennonite Church need not answer the questions under oath or affirmation, the bishop of their congregation shall sign a statement before the clerk of the circuit court prior to license issuance that the answers are true (9873). No license shall issue to any male person who is, or within five years has been, an inmate of any county asylum or home for indigent persons unless it satisfactorily appears that the cause of such condition has been removed and that such applicant is able to support a family and likely so to continue (9875). *Penalties.* Every clerk of the circuit court issuing any license contrary to this act [including §§9859, 9862, 9869, 9870, 9871, 9872, *supra*] shall forfeit to the state any sum in the discretion of a jury, to be recovered in an action of debt, which the prosecuting attorneys shall prosecute (9872). Every clerk of the circuit court issuing any license contrary to this act [§§9873–9880, *supra*] shall be fined not less than $25 or more than $100 (9880). Anyone procuring a marriage license by false statement or pretense shall be fined not exceeding $500 (9878).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by ministers and priests of every church throughout the state, by judges of courts of record, justices of the peace, and mayors of cities, within their respective counties, and by the Friends Church and German Baptists according to the rules of their societies (9881).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—Before persons shall be joined in marriage they shall produce a license authorizing their joinder in marriage (9869). *Penalty.* An officiant knowingly joining in marriage persons who have not complied with the statute as to procurement of licenses shall be fined not exceeding $500 (9879).

d. Form of Ceremony.—[No general statutory provision.] Friends and German Baptists may solemnize marriage according to the rules of their societies (9881). *Marriage is the union of one man with one woman to the exclusion of all others so long as both may live, and a contract among Indians terminable upon the parties' volition is not a valid marriage (12).*

e. Common Law Marriage.—No statutory provision. [See 9881 under 2f.] *Common law marriages, based upon the consent of the parties (13), are legal (14). No ceremony is necessary to validate a marriage (2) but only a bona fide agreement to form a matrimonial connexion, followed by cohabitation as husband and wife (2, 15, 16). Cohabitation does not constitute a common law marriage but is mere evidence thereof: the intent to contract the marriage and assume the relation must be shown by writing or witnesses, or in lieu thereof by cohabitation, general reputation, and conduct (15). These suffice to establish a common law marriage (17) unless the cohabitation was illicit in origin, in which case the actual contract must be proved (18).*

Where the parties contemplated marriage and an impediment thereto existed, a continuance in the relation after removal of the impediment may show mutual consent to a common law marriage given at that time (2). But where the cohabitation was meretricious in inception, a later actual marriage must be shown (11), for the meretriciousness is presumed to continue (19), and an innocent party thereto, not knowing of the impediment, after its removal would rely on the original ceremony and would not give consent to a new common law contract (19, 20). Cohabitation for two years after a divorce decree became absolute estops a party from setting up that the marriage was voidable as being contracted within the forbidden period after divorce (21). [See 1116 under 4c.] [Note: When a marriage, void because a former undissolved marriage exists, has been contracted by either party in the reasonable belief that such disability did not exist, the issue begotten before the discovery of such disability by the innocent party shall be legitimate (9866).]

f. Irregular Solemnization.—No marriage otherwise legal shall be void on account of the incapacity of the officiant (9881), and no marriage void or voidable for want of license or other required formality if either party believed it to be a legal marriage at the time (9882). *This provision is an assurance that absence of formality will not render a statutory marriage invalid (14). Penalty.* Whoever undertakes to join others in marriage when not lawfully authorized

to do so shall be fined from $50 to $500, to which may be added imprisonment of from ten days to three months (2893).

g. Other Provisions.—*Penalties.* Any authorized officiant joining persons in marriage contrary to the provisions of this act shall be fined not exceeding $500 (9884). Whoever knowingly joins in marriage persons forbidden by law to become married shall be fined from $50 to $500, to which may be added imprisonment of from ten days to three months (2893).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—All authorized officiants shall report all marriages performed by them within three days after their occurrence to the clerk of the circuit court of the county wherein license was issued (8161). *Penalty.* Anyone failing so to report shall be fined $5.00 for each offense (8161). Every person solemnizing a marriage shall file within three months a certificate thereof in the clerk's office of the county in which such marriage was solemnized (9883). *Penalty.* Any officiant failing to return a certificate with the license within three months after a marriage shall be fined from $5.00 to $100 (2894). *This penalty repeals a former statute providing increasing fine for each month of delay in making returns (22, 23). Upon indictment under that statute it was immaterial to punishment whether or no a license had been issued (24, 25).*

b. Local Record.—Application for marriage license shall be recorded by the clerk, together with the license and certificate of marriage, in a book which shall be a public record (9873; 9883). *Penalty.* See 9880 under 1k. The clerk of the circuit court of each county shall report to the county health commissioner each month the number of marriages for the preceding month, with such facts relating thereto as may be provided for on blanks furnished such clerk by the State Board of Health (8161). *Penalty.* Violation of this act is punishable by fine of from $10 to $100 (8171).

c. State Record.—The State Health Commissioner shall collect and record vital statistics and shall make a monthly report to his board, said report to be made a permanent record (8168). *Penalty.* See 8171 under 3b. [The statutes require only a statistical record and not a detailed record of individual marriages to be transmitted to the State Board of Health.—G.M.]

d. Evidence.—The clerk's record of the license and certificate, or a copy thereof, shall be presumptive evidence of the facts con-

tained (9883). In a bigamy prosecution neither marriage need be proved by record evidence but may be shown by such evidence as is admissible to prove a marriage in other cases (2550). *The marriage license and officiant's return are evidence of marriage in a bigamy prosecution (26). A copy of a record showing issuance of a marriage license, plus evidence of long cohabitation as husband and wife, establishes marriage in a civil suit (27). A certificate of marriage in a foreign state is not admissible in an adultery prosecution without preliminary proof of the parties' identity and of the record's conformity to the law of such state (28). Absence of a record of a marriage license in another state is too precarious a basis on which to declare a marriage void (1). The officiant's certificate is not necessary to prove the date of a marriage (29).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Persons not nearer of kin than second cousins are capable of entering marriage (9859); marriages of nearer kin solemnized within the state are absolutely void without legal proceedings (9861, 9863). *Prior to the enactment of this statute, marriages within the prohibited degrees were voidable only, as under canon law (30).* [Note: Marriages contracted by first cousins before 1907 are legalized and declared valid for all purposes (9860).] Sexual intercourse between parents and children, stepparents and stepchildren, grandparents and grandchildren, brothers and sisters, aunts and nephews, and uncles and nieces, knowing of their relationship, is punishable by imprisonment in the state prison from two to twenty-one years, or in the county jail from six months to one year (2551). [Inasmuch as §9863 declares absolutely void certain consanguineous marriages, consummation of marriage between the persons named in §2551 would be criminal. Cohabitation under marriages of first cousins and first cousins once removed, which are void, would be punishable as fornication by fine not exceeding $500, imprisonment not exceeding six months, or both (2552).—G.M.] *For relations between step-parents and stepchildren to be incestuous, the parties must have knowledge of the relationship (31, 32). Relationship by affinity ceases with the death of the mutually related person (33). Inasmuch as the statute defining degrees within which marriage is prohibited does not mention relationship by affinity, consanguinity alone is the basis of incest, and intercourse between a man and his wife's niece is not incestuous (34).*

b. Proper Civil and Racial Status.—Marriage solemnized within this state between a white person and one possessing one-eighth or

more Negro blood is absolutely void without legal proceedings (9862; 9863). *Penalty.* Marriage between white persons and persons having one-eighth or more Negro blood is forbidden, and such persons knowingly intermarrying shall be fined from $100 to $1000 and imprisoned from one to ten years (2879). *This statute is not contrary to the fourteenth amendment to the federal Constitution or to the Civil Rights Bill (35).* [Note: Counseling or assisting in such amalgamation is punishable by fine of from $100 to $1000 (2880).] [As to refusal of license for the marriage of an indigent male, see 9875 under 1k.]

c. Proper Legal Status.—Persons not having a spouse living are capable of entering marriage (9859); a marriage contracted in this state when either party has a spouse living is absolutely void without legal proceedings (9862; 9863). *The marriage of a person already married is void (2, 15, 19, 36, 37, 38, 39, 40) and no such second marriage can be contracted (20), but to afford judicial investigation of the facts the court may declare such second marriage null (37). The length of a spouse's absence is immaterial to the validity of a later marriage during his lifetime (36).* *Penalty.* Any person marrying again while a former spouse is living and a former marriage undissolved, no legal presumption of death having arisen, either shall be imprisoned in the state prison from two to five years, or shall be fined not exceeding $1000, imprisoned in the county jail not more than six months, or both (2549). *Criminal intent being the essence of crime, reasonable belief upon due inquiry that the first spouse was divorced at the time of the second marriage may be a defense to prosecution for bigamy (26). But where the act of marrying was intended, it is no defense that it was done in response to a religious belief (41). Cohabitation of a man already married with an unmarried woman (their marriage being void or bigamous) constitutes fornication (39). Continued absence for over seven years raises the presumption of death (42). Only death or judicial decree can dissolve a marriage (43).*

Parties against whom a divorce shall be rendered without other notice than publication in a newspaper may have the judgment opened at any time within two years, and until the expiration of said two years the party obtaining such divorce shall not marry again, which shall be stated in the decree (1116). *A marriage in violation of an order forbidding remarriage is not absolutely void, unless so declared by statute, but is voidable only (21). Inasmuch as the statute imposes no penalty for remarriage within the forbidden period, violation of a decree thereunder is not punishable (44). There is a presumption in favor of the validity of a marriage (1, 2, 6, 10) which puts upon the opponent of a later ceremonial marriage the burden of proving the lack*

of dissolution of an earlier marriage in civil cases (45, 46) but not in bigamy prosecutions (47, 48).

d. Proper Consent of Parties.—Marriage is declared to be a civil contract (9859). *Independently of the divorce law a marriage procured by fraud may be annulled on suit of the injured party (3, 49). Marrying to avoid prosecution for seduction with intent to abandon is fraud allowing of annulment (49, 50), but not so mere misrepresentations of personal character, previous dissolved marriages, et cetera, not composing essential elements of the marriage relation, except in rare cases where the person imposed upon is immature and the marriage has not been consummated (3).*

5. STATE SUPERVISION

Applications for marriage license shall be uniform throughout the state, and the State Board of Health shall furnish a form therefor to the several clerks (9874). The State Board of Health shall have supervision of registration of births, deaths, and marriages, and shall make up such forms as they deem necessary for the thorough registration and report of all vital statistics throughout the state (8123, 8124). The State Board of Health shall collect and tabulate all vital statistics and make annual report thereof to the Governor (8124). Clerks of the circuit court of each county shall make their monthly report of marriages to the county health commissioner on blanks furnished by the State Board of Health (8161). [See comment under 3c.]

6. INTERSTATE RELATIONS

If residents of this state, with intent to evade the provisions of §§9873 and 9875 [see 1k and 1h respectively], go into another state and are there married intending to return afterwards and reside in this state, and do so return and reside, such marriage shall be void and the parties subject to the penalties provided for in this act [see 9878 under 1k]; but this section shall not apply to persons who in good faith become or are citizens of any other state (9877). *The doctrine that a marriage valid where contracted is valid elsewhere applies only as between civilized states and, being recognized only by courtesy, is not applicable to a marriage repugnant to the law of the forum (12).*

7. SEX OFFENSES AND MARRIAGE

Marriage shall not be a defense to any violation of the act concerning pandering (2559). *The subsequent marriage of the defendant with*

a woman whom he carnally knew before she was sixteen is no defense to the crime of rape (51). But the subsequent marriage of the parties is a bar to further prosecution for seduction (52). If, however, a man liable to prosecution for seduction or bastardy fraudulently marries the woman and abandons her within two years he is by statute liable to penalty (53). Prior to such enactment if the parties intermarried the woman had no remedy when deserted, for the bastardy proceeding permanently abated (54, 55). Civil action for damages for seduction is not defeated by the man's fraudulently marrying the woman (49, 50).

INDIANA CASES

1. Franklin v. Lee, 30 App. 31 (1902). **2.** Teter v. Teter, 88 I. 494 (1883); 101 I. 129 (1885). **3.** Christlieb v. Christlieb, 71 App. 682 (1919). **4.** Develin v. Riggsbee, 4 I. 464 (1853). **5.** Wiley v. Wiley, 75 App. 456 (1919–1921). **6.** Bruns v. Cope, 182 I. 289 (1914). **7.** Huffman v. Huffman, 51 App. 330 (1912). **8.** Pence v. Aughe, Guardian, 101 I. 317 (1885). **9.** Langdon v. Hadley, 150 N.E. 793 (1926). **10.** Castor v. Davis, 120 I. 231 (1889). **11.** Nossaman v. Nossaman, 4 I. 648 (1853). **12.** Roche v. Washington, 19 I. 53 (1862). **13.** Trimble v. Trimble, 2 I. 76 (1850). **14.** Castor v. McDole, 137 N.E. 889 (1923); reprinted with changes, 148 N.E. 643. **15.** Meehan v. Edward Valve etc. Co., 65 App. 342 (1917). **16.** Hummel v. State, 73 App. 12 (1920). **17.** Harter v. Addison, Adm'x, 80 App. 204 (1923). **18.** Mayes v. Mayes, 147 N.E. 630 (1925). **19.** Compton v. Benham, 44 App. 51 (1908–1909). **20.** Simms v. Kirk, 81 App. 515 (1924).

21. Mason v. Mason, 101 I. 25 (1885). **22.** State v. Horsey, 14 I. 185 (1860). **23.** State v. Pierce, 14 I. 302 (1860). **24.** State v. McWhinney, 5 Blackf. 364 (1840). **25.** State v. Wilder, 7 Blackf. 582 (1845). **26.** Squire v. State, 46 I. 459 (1874). **27.** Haddon v. Crawford, 49 App. 551 (1912). **28.** Sams v. State, 195 I. 497 (1924). **29.** Bronnenburg v. Charman, 80 I. 475 (1881). **30.** Adkins v. Holmes, 2 I. 197 (1850). **31.** Baumer v. State, 49 I. 544 (1875). **32.** Norton v. State, 106 I. 163 (1886). **33.** Gillespie v. State, 168 I. 298 (1907). **34.** State v. Tucker, 174 I. 715 (1910). **35.** State v. Gibson, 36 I. 389 (1871). **36.** Janes v. Janes, 5 Blackf. 141 (1839). **37.** Tefft v. Tefft, 35 I. 44 (1871). **38.** Light v. Lane, 41 I. 539 (1873). **39.** Hood v. State, 56 I. 263 (1877). **40.** Wellinger v. Wellinger, 39 App. 60 (1906).

41. Long v. State, 192 I. 524 (1922). **42.** Cooper v. Cooper, 86 I. 75 (1882). **43.** Wiseman v. Wiseman, 89 I. 479 (1883) and 73 I.

112 (1880). **44.** State ex rel. Seifert v. Branner, 174 I. 684 (1910). **45.** Boulden v. McIntire, 119 I. 574 (1889). **46.** Wenning v. Teeple, 144 I. 189 (1895–96). **47.** Fletcher v. State, 169 I. 77 (1907). **48.** Lesueur v. State, 176 I. 448 (1911). **49.** Henneger v. Lomas, 145 I. 287 (1896). **50.** Bishop v. Redmond, 83 I. 157 (1882). **51.** Zell v. State, 189 I. 433 (1920). **52.** State v. Otis, 135 I. 267 (1893). **53.** Latshaw v. State ex rel. Latshaw, 156 I. 195 (1901). **54.** Moran v. State, 73 I. 208 (1880). **55.** State ex rel. Richeson v. Richeson, 36 App. 373 (1905).

IOWA

REFERENCES: Code of Iowa, 1924; Acts of the 41st and 42d General Assembly of Iowa, 1925, 1927; Reports through Volume 201.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Code and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Iowa section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Previous to the solemnization of any marriage, a license for that purpose must be obtained (10429). The provisions relating to procuring licenses are not applicable to members of denominations having any peculiar mode of entering the marriage relation (10443). For marriages between Indians, celebrated by the government superintendent of an Indian agency, no license shall be required (10436). *Marriage without license formerly constituted a misdemeanor for the parties and all those assisting (1).*

b. Issuer.—License must be obtained from the clerk of the district court of the county wherein the marriage is to be solemnized (10429).

c. Compensation of Issuer.—The clerk of the district court shall collect a fee of $1.50 for each license issued, all of which shall be paid into the county treasury (10837), the clerk receiving a salary as exclusive compensation (10841).

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision as to advance notice. [See Acts 1925, ch. 187, under 1h.]

f. Minimum Age.—License must not be granted where either party is under the age necessary to render the marriage valid (10429). [As to clerk's requiring proof of age, see 10430 under 1k.] The mar-

riage of a male of sixteen or of a female of fourteen years is valid; if either party is under such age the marriage may be a nullity or not at the option of such party, made known at any time before he or she is six months older than the age thus fixed (10428). *A former statute, though not authorizing the marriage of a female under fourteen, did not render such marriage void (2).*

g. Parental Consent.—License must not be granted where the male is a minor or the female is under eighteen years unless a certificate of parental consent is filed, executed by the parents or surviving parent or, if both are dead, by the guardian (10429). *Penalty.* The false making of such certificate is punishable as forgery (10434), by imprisonment in the penitentiary not exceeding ten years or in the county jail not exceeding one year, or by fine not exceeding $1000 (13139). *Forgery of a paper purporting to be a parent's certification that the minor is of age is not within the statute punishing forgery of a certificate of parental consent (3).* If either applicant is a minor, written consent of the parents or guardian must be filed with the clerk and be acknowledged by them or proved genuine (10434). [Note: Minority extends to the age of twenty-one, but females after reaching eighteen years may make valid marriage contracts (10492).] *Penalty.* If the clerk issues a license in violation of §10434, or if the marriage is solemnized without parental consent being procured, the issuer, the parties, and all persons aiding them are guilty of a misdemeanor (10435), punishable by imprisonment for not more than one year, fine not exceeding $500, or both (12894). *The marriage of a minor without parental consent may not be void, the pendlty on the officiant protecting the interest of society (2).*

h. Mental and Physical Qualifications.—License must not be granted where either party is disqualified from making any civil contract, or is idiotic, imbecile, insane, or under guardianship as an incompetent (10429). [See 10430 and 10431 under 1k.] The Board of Control shall furnish quarterly to each clerk of the district court lists of all persons over fourteen who are inmates of state institutions for the insane or feeble-minded, or who have been committed to the guardianship of the board as feeble-minded, together with the names of such other persons as are disqualified for marriage under §10429 [see 1f, 1g, 1h, 1k]. No clerk shall issue any license without first satisfying himself that the name of neither party is contained in the latest list from the Board of Control. Any person aggrieved by such refusal may petition the district court to have his competency to marry established (A. 1925, ch. 187).

Marriage may be annulled where either party was insane or idiotic at the time of marriage (10486). *The decree of annulment for insanity shows that no marriage existed in fact (4) except under a statute allowing an innocent party in an annulment action the same compensation as in divorce (5).* The husband may obtain a divorce from the wife when she was pregnant by another man at the time of marriage unknown to the husband, unless at the same time the husband had an illegitimate child living unknown to the wife (10476). *Pregnancy at the time of marriage is ground for divorce regardless of the husband's antenuptial intercourse with the wife if she falsely represents to him that he was father of her unborn child (6).*

i. Form of License.—No provision.

j. Record of License.—The affidavit or certificate of age and qualifications of the parties shall be filed by the clerk and a memorandum thereof entered in the license book (10432), as must also a memorandum of parental consent to the marriage of a minor (10434).

k. Other Provisions.—License must not be granted where the parties are within the degrees of consanguinity or affinity within which marriages are prohibited by law (10429). [See 4a.] Before issuing a license the clerk shall require at least one affidavit from some competent and disinterested person stating such facts as to age and qualifications of the parties as the clerk may deem necessary to determine their competency (10430). If the clerk is acquainted with the age and qualifications of the parties he may execute, in lieu of said affidavit, a certificate stating such fact and that he knew the parties to be competent (10431). Upon issuing a license the clerk shall give the applicant a blank return for the marriage with such instructions as will insure a complete return (10433). *Penalty.* Wilful neglect to perform a duty enjoined by law upon a public officer is a misdemeanor (13316), punishable by imprisonment not exceeding one year, fine not exceeding $500, or both (12894).

2. SOLEMNIZATION

a. Officiant.—Marriages must be solemnized by a justice of the peace—whose jurisdiction is co-extensive with his county (10502)—by the mayor of the city or town wherein the marriage takes place, by a judge of the supreme, district, superior, or municipal court of the state, by a minister ordained or licensed according to the usages of his denomination, by a government superintendent of any Indian agency, where the parties are members of an Indian tribe under his

supervision (10436), or by members of any particular denomination having a peculiar mode of entering the marriage relation (10443). *A marriage solemnized by a mayor outside the limits of his town is valid regardless of the extent of his authority (7).*

b. Officiant's Credentials.—No provision.

c. Presentation of License.—No provision. [The presentation is somewhat implied in the combined reading of 10439 and 10440 under 3a and 10433 under 1k, though in fact the license and certificate are not in one form. To protect himself from the penalty provided by §10435 (under 1g) the officiant might best require presentation of the license.—G.M.]

d. Form of Ceremony.—[No general provision.] The provisions of this chapter relating to the solemnizing of marriages are not applicable to members of any denomination having any peculiar mode of entering the marriage relation (10443).

e. Common Law Marriage.—*Any mutual agreement* in praesenti *by competent parties to be husband and wife, followed by cohabitation, constitutes a valid marriage (8, 9, 10, 11, 12). Consummation suffices to establish the marriage agreement without extended cohabitation (12). Cohabitation, from which may be inferred matrimonial intention and consent, does not itself constitute marriage (9, 13, 14, 15), and the reputation necessary in corroboration thereof cannot be divided (14). A matrimonial agreement signed merely to avoid further prosecution for illicit cohabitation and with no intention of assuming the marriage relation does not constitute a marriage (10).*

If the parties, one of whom has a spouse living at the time of marriage, cohabit after the death or divorce of the former spouse, such marriage shall be valid (10445). *Where a marriage is originally void, as contracted during the lifetime of a prior spouse or within the forbidden period after divorce, if the parties continue to cohabit after removal of the impediment a subsequent marriage will be presumed to have occurred (8, 16). But if the relations were originally illicit, affirmative proof of present intention to assume legitimate relations is necessary to establish a common law marriage (14, 15).*

f. Irregular Solemnization.—Marriages solemnized, with the consent of the parties, in any other manner than is herein prescribed, are valid; but the parties thereto and all persons aiding them shall forfeit $50 each to the school fund. This shall not apply to the officiant if within fifteen days after the ceremony he make the return required

(10437). *A marriage performed by an official exceeding his authority is valid notwithstanding this provision for forfeiture and requires no cohabitation as does a common law marriage (7). A conspiracy of two persons, one to represent himself as a justice of the peace and the other to seduce a woman by means of a fraudulent marriage ceremony, is criminal even though such ceremony created a valid marriage (17).*

g. Other Provisions.—[As to penalty for solemnization of the marriage of a minor without parental consent, see 10435 under 1g.] [Note: Any person authorized to solemnize marriage may charge $2.00 in each case (10438).]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—After the solemnization of a marriage the officiant shall give each party a certificate thereof and shall make return of the marriage within fifteen days to the clerk of the district court upon the blank provided (10439). The return of a marriage shall state the full name, age, color, nationality, residence, occupation, and place of birth of each party, the number of marriage, the parents' names, time and place of ceremony, witnesses, and name and office of the officiant (10440, as amended A. 1925, ch. 186). The return of marriages of Indians celebrated by the superintendent of an Indian agency shall be made to the clerk by such superintendent (10436). When a marriage is consummated without the services of a clergyman or magistrate, the required return thereof shall be made to the clerk by the husband (10442). [Note: If the return is not complete, the clerk shall require the person making it to supply the omitted information (10441, as amended A. 1927, ch. 217).]

b. Local Record.—The clerk of the district court in each county shall keep a record book for marriages (2421), showing for each marriage the same items as are required in the return (2422). [See 10440 under 3a.] *Penalties.* Violation of this chapter is punishable by fine of from $5.00 to $100, imprisonment not exceeding thirty days, or both (2436); a second violation, by fine of from $25 to $200, imprisonment not exceeding sixty days, or both (2437). A public officer fraudulently making false entries or returns where entries or returns are authorized by law shall be fined not exceeding $1000, imprisoned not exceeding five years, or both (13314).

c. State Record.—The clerk of the district court shall transmit annually to the state registrar all original returns of marriages filed in his office, and such other relative data as the state registrar may

prescribe (2425). *Penalty.* See 2436, 2437, and 13314 under 3b. The state registrar (Commissioner of Public Health) examines, arranges, files, and indexes the original certificates of marriages (2393).

d. Evidence.—Any certified copy of a record of marriage made under the chapter on vital statistics shall be presumptive evidence of the facts therein stated (2431). *A marriage may be established even in criminal prosecutions, in absence of proof to the contrary, by the register required by statute to be kept (18, 19) or by a certified transcript thereof (20). Though a parish register in England, whose keeping is required by law, is competent evidence of a marriage recorded in the usual course of business (21), a mere memorandum of a marriage certificate from the custodian of records in another state is not admissible, for the act of Congress requires an exemplification of the certificate (22). A certificate of marriage is admissible in a civil action though slightly misdated and signed by one party with a cross (23).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Marriages within the prohibited degrees are void (10445) and may be annulled (10486). [As to prohibition of license issuance, see 10429 under 1k.] *Relationship by affinity ceases when the marriage ceases which created the affinity, and after divorce from his wife a man may marry her daughter by a former marriage (24). Marriage of an uncle and niece by affinity is not within the prohibited degrees (25). The statute making void the marriage of first cousins does not affect the validity of a common law marriage previously entered into (11). Penalty.* If persons being within the degrees of consanguinity or affinity within which marriages are declared void by law carnally know each other, they shall be imprisoned not exceeding twenty-five years (12978). *Under a former statute the mere intermarriage of persons within the prohibited degrees (brother and sister) constituted incest without proof of carnal relations (19).*

b. Proper Civil and Racial Status.—No provision.

c. Proper Legal Status.—Marriage between persons either of whom has a spouse living at the time shall be void and may be annulled provided they have not knowingly cohabited after the death or divorce of the former spouse of such party (10445; 10486). *The marriage of a person already lawfully married is void ab initio (26, 27). But a marriage being presumed legal until the contrary is shown, in action by a husband for annulment because of the wife's alleged prior*

marriage, she is entitled to temporary alimony (28), and a woman intending present marriage and cohabiting with a married man, whose conduct would justify her in believing that he intends present marriage, may be entitled to marital rights (29, as interpreted by 9). Any person having a former spouse living who marries another, or continues to cohabit with such second spouse, shall be imprisoned in the penitentiary not more than five years, or shall be fined not exceeding $500 and imprisoned in the county jail not more than one year (12975), unless the former spouse has continually remained beyond the seas or has voluntarily withdrawn and remained absent for three years together, the party remarrying not knowing the other to be living within that time, or unless the party remarrying has good reason to believe such former spouse dead, or has been legally divorced (12976). *Though the presumption of death does not arise until after an absence of seven years (30, 31), it will be presumed in favor of the innocence of the spouse marrying within that time that the never-returning absentee died prior to the later marriage (31).*

Neither party to a divorce shall marry any other person within a year from the date of the decree unless permission is granted by the court in such decree (10484). *Penalty.* Any person marrying contrary to the preceding section shall be guilty of a misdemeanor (10485), punishable by imprisonment not exceeding one year, fine not exceeding $500, or both (12894). *Though it has been suggested that a marriage within the forbidden period after divorce is void (16), it has been held that the statute merely prohibits and does not invalidate such a marriage (32). The prohibition of remarriage after divorce has no extraterritorial effect (33, 34) and does not deprive a person so marrying outside the state of the right to a divorce from such marriage (35).* [See 6.] *There is a presumption in favor of the validity of a marriage (36, 37, 38).*

d. Proper Consent of Parties.—Marriage is a civil contract, requiring the consent of parties capable of entering other contracts (10427). *There must be a meeting of minds in mutual consent (13) and an intention of assuming the marital relation (10). Though false representations as to character, social standing, or fortune do not constitute fraud allowing of annulment (39), a person fraudulently induced into a marriage may have a tort action in deceit against a third person making the false representation (40). A woman's fraudulent representation that the man is the cause of her pregnancy allows of divorce notwithstanding the parties' antenuptial intercourse (6). Fear of prosecution for seduction, misrepresentation of punishment therefor, and*

threats (if not malicious) do not constitute duress allowing of annulment (41), and a contract executed in consideration of a marriage celebrated during a seduction prosecution is not void for duress (42). Cohabitation, even if brief, may constitute ratification of a voidable marriage (41). *Penalty.* Any person taking any woman unlawfully and against her will, compelling her to marry him or any other person, shall be fined not exceeding $1000 and imprisoned not exceeding ten years (12969).

5. STATE SUPERVISION

The state registrar (Commissioner of Public Health) has general supervision of the registration of vital statistics; he issues detailed instructions and furnishes blank forms (2393), the record books being uniform throughout the state (2421),[1] and showing the same items as are required in a return of the marriage [see 10440, under 3a] (2422). The registration system provided shall be exclusive throughout the state (2432). The State Department of Health shall investigate violations of the law relative to registration of vital statistics (2433). The county attorney and Attorney General shall take necessary court proceedings in cases of violations reported by the state department to aid in carrying out the provisions concerning vital statistics (2434–35). [See 3c.]

6. INTERSTATE RELATIONS

No statutory provision. *A marriage valid where contracted is valid everywhere (33, 34, 43), and if not actually polygamous the fact that polygamy is recognized under the law of the place where contracted does not make the marriage invalid (43). If a marriage would have been valid had it been contracted here, it will be presumed valid under the law of another state where contracted (44). The Illinois statute prohibiting remarriage after divorce has no extraterritorial effect upon a marriage validly contracted here (32), and the Iowa statute does not apply to a divorce decree granted elsewhere (16).*

7. SEX OFFENSES AND MARRIAGE

Marriage, before judgment, of the defendant and the woman seduced bars further prosecution (12971), but if after such marriage the man deserts the woman without good cause, he shall be guilty of

[1] The requirement appears to be misinterpreted in practice, the State Auditor prescribing the uniform blanks under §111, which seems by rights to be limited to financial accounts.—G.M.

a misdemeanor (12972). [For penalty for misdemeanor, see 12894 under 1g or 4c.] *The statute barring prosecution for seduction allows a man to atone for his wrong by marriage (41), but no offer, nothing short of actual marriage, is a bar to prosecution (45).*

IOWA CASES

1. White v. State, 4 I. 449 (1857). **2.** Goodwin v. Thompson, 2 Greene 329 (1849). **3.** State v. Rhine, 84 I. 169 (1891). **4.** Floyd County v. Wolfe, 138 I. 749 (1908). **5.** Barber v. Barber, 74 I. 301 (1887). **6.** Wallace v. Wallace, 137 I. 37 (1908). **7.** State v. McKay, 122 I. 658 (1904). **8.** Blanchard v. Lambert, 43 I. 228 (1876). **9.** McFarland v. McFarland, 51 I. 565 (1879). **10.** Pegg v. Pegg, 138 I. 572 (1908). **11.** In re Estate of Wittick, 164 I. 485 (1914). **12.** Love v. Love, 185 I. 930 (1919). **13.** Brisbin v. Huntington, 128 I. 166 (1905). **14.** In re Estate of Boyington, 157 I. 467 (1912). **15.** In re Estate of Medford, 197 I. 76 (1924). **16.** Lee v. Lee, 150 I. 611 (1911). **17.** State v. Savoye, 48 I. 562 (1878). **18.** Verholf v. Van Houwenlengen, 21 I. 429 (1866). **19.** State v. Schaunhurst, 34 I. 547 (1872). **20.** State v. Matlock, 70 I. 229 (1886). **21.** Casley v. Mitchell, 121 I. 96 (1903). **22.** Niles v. Sprague, 13 I. 198 (1862).

23. Johnson v. Clancy, 105 I. 242 (1898). **24.** Back v. Back, 148 I. 223 (1910). **25.** State v. Andrews, 167 I. 273 (1914). **26.** Carpenter v. Smith, 24 I. 200 (1868). **27.** Drummond v. Irish, 52 I. 41 (1879). **28.** Ricard v. Ricard, 143 I. 182 (1909). **29.** Borton v. Borton, 48 I. 697 (1878). **30.** State v. Henke, 58 I. 457 (1882). **31.** Smith v. Fuller, 138 I. 91 (1908). **32.** Webster v. Modern Woodmen, 192 I. 1376 (1922). **33.** Dudley v. Dudley, 151 I. 142 (1911). **34.** Farrell v. Farrell, 190 I. 919 (1921). **35.** Houston v. Houston, 204 N.W. 239 (1925). **36.** Schubert v. Barnholdt, 177 I. 232 (1916). **37.** Brett v. Brett, 191 I. 262 (1921). **38.** U.S. v. Green, 98 Fed. 63 (1899). **39.** Wier v. Still, 31 I. 107 (1871). **40.** Beach v. Beach, 160 I. 346 (1913). **41.** Sherman v. Sherman, 174 I. 145 (1916). **42.** Armstrong v. Lester, 43 I. 159 (1876). **43.** Royal v. Cudahy Packing Co., 195 I. 759 (1923). **44.** State v. Nadal, 69 I. 478 (1886). **45.** State v. Mackey, 82 I. 393 (1891).

KANSAS

REFERENCES: Revised Statutes of Kansas, 1923; Laws of Kansas, 1925, 1927; Reports through Volume 121.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Revised Statutes and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Kansas section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—The probate judges shall issue marriage licenses when applied to for that purpose by any person legally entitled to such license (23–106). Quakers are exempted from the necessity of obtaining a license (23–116).

b. Issuer.—The probate judges of the several counties shall issue marriage licenses (23–106).

c. Compensation of Issuer.—The probate judge charges $2.50 for issuing and recording marriage license and return (28–113), which fees he pays over to the county treasurer (28–315), as he receives a salary (28–113; L. 1927, ch. 216).

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—No license shall be issued to any male under eighteen or female under sixteen years without the consent of the probate judge (23–106). [Since the probate judge issues licenses, this provision probably limits issuance by his deputy where parties are below the ages specified.—G.M.] *Penalty.* See 23–111 under 1k. The age of legal consent shall be of males fifteen and of females twelve years (21–902). The marriage of a party incapable of contracting it from want of age may be annulled on suit of the incapable party (60–1515). [As to remarriage after a marriage under the age of legal consent, see 21–901 under 4c.]

g. Parental Consent.—No license shall issue for the marriage of a male under twenty-one or female under eighteen years without the

consent of his or her father, or if incapable, of the mother, or guardian, given at the time in person or evidenced by a duly attested certificate in writing. The probate judge may issue license upon the affidavit of the applicant or some responsible person for him that the parties are of lawful age, and the judge may administer oaths therefor (23–106). *Failure to procure parental consent does not deprive the minor of capacity or render void the marriage of a person over the age of legal consent (1). Penalties.* [See 23–111 under 1k.] Every person swearing falsely in such affidavit shall be fined not exceeding $500 (23–106). *Inasmuch as making an oath as to age implies an affirmative belief in the truth of the assertion, lack of knowledge of its untruth is no defense (2).*

h. Mental and Physical Qualifications.—No man or woman, unless she be over forty-five, who is epileptic, imbecile, feeble-minded, or afflicted with insanity shall marry, nor shall the children of such parents marry unless the afflicted party was discharged as cured from an institution for insane more than nine months preceding the child's birth and remained cured for twenty years (103–120). *For a woman's marriage to be prohibited by this statute, which is a reasonable regulation to effect the legitimate objects of marriage, her parent must have been insane at the time of her birth (3).* An officer shall not knowingly issue a license for the marriage of such persons and must inquire to ascertain such condition (103–121). *Penalty.* Any person knowingly violating this act is punishable by fine not exceeding $1000, imprisonment not exceeding three years, or both (23–123).

The marriage of a party incapable of contracting it from want of understanding may be annulled on suit of the incapable party(60–1515). *Though the marriage of an insane person is absolutely void for want of capacity to consent, for reasons of property and legitimacy it is best to bring action for annulment (4). The mental unsoundness allowing of annulment must cause incapacity to understand the nature of the contract itself and deprive of intelligent consent, mere mental weakness caused by disease not sufficing in absence of fraud (5).*

Divorce may be granted when the wife at the time of marriage was pregnant by a man other than her husband (60–1501). *Where the husband was ignorant of the wife's pregnancy by a stranger at the time of marriage he may be entitled to divorce (6).*

i. Form of License.—The license, authorizing the marriage of the persons named, shall state the age of the parties and, if minors, the name of the parent or guardian consenting (23–106).

j. Record of License.—The probate judge shall keep a record of all licenses issued (23–112). *Penalty.* Failure to record a copy of the license shall subject the judge to fine not exceeding $1000 (23–113).

k. Other Provisions.—Before granting a license the probate judge shall require of the applicant an oath that the parties are not within the prohibited degrees, and may in his discretion examine witnesses (23–114). [See 4a.] Any probate judge failing to comply with any of the provisions of this act shall be fined not exceeding $100 (23–111). Any probate judge refusing or neglecting to issue a license to any person legally entitled shall be fined not exceeding $1000 (23–113). *Penalties.* For failing to examine the applicant as provided the probate judge is liable to a fine not exceeding $1000, with cost, in granting license to parties not legally entitled thereto (23–114). Whoever shall knowingly issue a license for an incestuous marriage is punishable by a fine of from $100 to $1000, imprisonment of from three months to five years, or both (23–103).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by every judge, justice of the peace, or licensed preacher of the gospel, and by the Society of Friends in their meetings (23–116). *A probate judge pro tem. may solemnize marriages (7).*

b. Officiant's Credentials.—No provision.

c. Presentation of License.—The license authorizes the marriage of the parties named (23–106). *Penalty.* An officiant marrying persons before a license shall be produced to him shall be fined not exceeding $1000 (23–104).

d. Form of Ceremony.—[No general provision.] Quakers may solemnize marriage in the form heretofore practiced in their meetings (23–116). *A ceremony which is a sort of agreement of partnership of responsibilities without subjugation of the woman is a repudiation of marital rights and not a marriage (8, concurring opinion).*

e. Common Law Marriage.—No statutory provision. *The mutual present consent to immediate marriage by capable persons constitutes a valid marriage, at least if followed by cohabitation (8, 9, 10, 11), and such contract may be implied from conduct in mutual recognition of the matrimonial state, cohabitation and repute (10, 11, 12, 13, 14). If parties in good faith desiring marriage do what they can to render the union*

matrimonial but one of them is under a disability—e.g. remarriage prohibited after divorce or no divorce from a prior marriage—their cohabitation thus matrimonially meant will make them husband and wife in law from the removal of the disability—e.g. expiration of the prohibited period or death of the prior spouse (14, 15).

f. Irregular Solemnization.—No provision.

g. Other Provisions.—*Penalties.* No officiant shall knowingly unite in marriage persons either of whom is afflicted with epilepsy, imbecility, feeble-mindedness, or insanity, unless the woman be over forty-five (23–122), and one doing so is punishable by fine not exceeding $1000, imprisonment not exceeding three years, or both (23–123). Any officiant knowingly solemnizing an incestuous marriage is punishable by fine of from $100 to $1000 and imprisonment of from three months to five years (23–103). Any officiant knowingly solemnizing a marriage which would be criminal, or where either party is under the age of legal consent, or where any other legal impediment exists, is punishable by imprisonment not exceeding one year, fine not less than $500, or both (21–910). *The legislature may prescribe reasonable regulations concerning marriage, and without declaring the marriage void may make penal the violations of the statutory requirements (8).*

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant within ten days shall return the license to the issuer with his certificate endorsed thereon (23–109). [Note: §23–116, enacted earlier, makes the time limit thirty days.] *Penalty.* An authorized officiant failing to comply with any of the provisions of this act shall be fined not exceeding $100 (23–111).

b. Local Record.—The probate judge shall enter the returned certificate on the marriage record (23–109; 23–112). *Penalty.* A probate judge failing to record such return within thirty days shall be fined not exceeding $1000 (23–113).

c. State Record.—The probate judge shall forward each month to the State Registrar of Vital Statistics the license and certificate for every marriage, and a statement of the names of the parties and name and address of the officiant (23–109). All marriages occurring within the state shall be registered with the State Registrar of Vital Statistics (23–105), who shall index the records (23–110). *Penalty.* Any probate judge failing to comply with these provisions shall be fined not exceeding $100 (23–111).

d. Evidence.—The marriage record kept by probate judges is evidence in all courts (23–117), as is a certified copy of the record of the state registrar (23–110), and the register of marriages kept according to the custom of any religious society in the state (60–2862). *The original record of a probate judge of a license and return is admissible to prove a marriage in a bigamy prosecution (16). An original marriage license issued in another state is admissible if unofficially identified by the issuer, for though copies of records must be officially authenticated, originals need only be identified (17).* Continuous cohabitation as husband and wife is presumptive evidence of marriage for the purpose of giving a widow a share in her deceased husband's realty (22–108). No greater proof of marriage is required in nonsupport prosecutions than in civil actions (21–447).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Marriages within such degrees are incestuous and absolutely void (23–102). *Penalty.* Persons contracting marriage in fact contrary to this provision are punishable by fine of from $100 to $1000, imprisonment of from three months to five years, or both (23–103). [As to penalty for license issuance or solemnization, see 21–103 under 1k and 2g.] *The marriage of a man with the daughter of his half-brother would be within the prohibited degrees, and cohabitation between them is incestuous (18).*

b. Proper Civil and Racial Status.—No provision.

c. Proper Legal Status.—Divorce may be granted when either party had a spouse living at the time of marriage (60–1501). *The marriage of a person who has a spouse living is absolutely void, and though no action is necessary to declare its nullity, for prudential reasons the innocent party should have the colorable marriage annulled or dissolved (1, 19).* Bigamy is punishable by confinement and hard labor not exceeding five years, in a county jail not less than six months, or by a fine not less than $500, or by both a fine not less than $100 and imprisonment not less than three months (21–901). Bigamy does not extend to a person whose spouse has been continually without the United States for five successive years, has been absent for five successive years and not known to the person marrying to be living, or has been sentenced to imprisonment for life, or where the former marriage has been declared void, dissolved and remarriage not prohibited, or was contracted by such person when under the age of fifteen if a male or twelve if a female (21–901).

A marriage within six months after a divorce decree of one of the parties or within thirty days after judgment on appeal is absolutely void and the person guilty of bigamy (60–1512), punishable by imprisonment of from one to three years (60–1513). *Though mere prohibition of remarriage after divorce, with penalty, does not make the later marriage void (20), the present statutory provision makes the divorced person absolutely incapable of contracting a marriage within the prohibited period (21, 22, 14). But except for the stated period (5), and for all purposes but remarriage, the divorce decree terminates the marriage relation (23). The strong presumption of the validity of a second marriage includes an inference of the dissolution of the first marriage (15, 24).*

d. Proper Consent of Parties.—Marriage is a civil contract to which the consent of the parties is essential (23–101). *The consent must be to enter the actual marriage status, not some relationship repudiating marital rights (8, concurring opinion).*

Though fraud necessary for annulment must be such as to vitiate the marriage contract, and concealment of previous unchaste conduct or immorality is usually not sufficient, such serious misrepresentation suffices to allow annulment for the protection of a very young man marrying without parental consent (1) or of a very old man, crippled and of impaired mind (25). Concealed pregnancy by a stranger at the time of marriage allows of divorce (6).

Penalty. Compelling the marriage of a woman is punishable by imprisonment of from five to twenty-one years (21–426).

5. STATE SUPERVISION

The forms of marriage license shall be furnished by the State Registrar of Vital Statistics (23–107). The State Board of Health shall supervise the registration of marriages (65–102). The county attorney of any county, when presented with facts as to failure of a license issuer or officient to comply with the law as to marriage, shall bring court proceedings against parties responsible for the alleged violation (23–111).

6. INTERSTATE RELATIONS

Marriages valid where contracted are valid in Kansas (23–115). *A marriage valid where contracted is valid here (12), even if contracted between members of an Indian tribe living on a reservation in Kansas (26).*

7. SEX OFFENSES AND MARRIAGE

No statutory provision. *In the absence of a statute declaring subsequent intermarriage of the parties to bar prosecution for seduction, the marriage does not relate back and make innocent an act in violation of the statute (27). Nor does the intermarriage of the parties relieve the defendant of criminal consequences for ravaging a female under eighteen years (28).*

KANSAS CASES

1. Browning v. Browning, 89 K. 98 (1913). **2.** State v. Rupp, 96 K. 446 (1915). **3.** Witt v. Heyen, 114 K. 869 (1923); corrected, 115 K. 334. **4.** Powell v. Powell, 18 K. 371 (1877). **5.** Baughman v. Baughman, 32 K. 538 (1884). **6.** May v. May, 71 K. 317 (1905). **7.** State ex rel. Baird v. Anderson, 114 K. 297 (1923). **8.** State v. Walker, 36 K. 297 (1887). **9.** Matney v. Linn, 59 K. 613 (1898). **10.** Shorten v. Judd, 60 K. 73 (1898). **11.** Renfrow v. Renfrow, 60 K. 277 (1899). **12.** State v. Hughes, 35 K. 626 (1886). **13.** State v. McFarland, 38 K. 664 (1888). **14.** Schuchart v. Schuchart, 61 K. 597 (1900). **15.** Haywood v. Nichols, 99 K. 138 (1916). **16.** State v. White, 19 K. 445 (1877). **17.** State v. Pendleton, 67 K. 180 (1903). **18.** State v. Reedy, 44 K. 190 (1890). **19.** Fuller v. Fuller, 33 K. 582 (1885). **20.** Conn v. Conn, 2 App. 419 (1895). **21.** Wilhite v. Wilhite, 41 K. 154 (1889). **22.** Blush v. State, 4 App. 145 (1896). **23.** Durland v. Durland, 67 K. 734 (1903). **24.** Kinney v. Woodmen of the World, 110 K. 323 (1922). **25.** Entsminger v. Entsminger, 99 K. 362 (1916). **26.** Moore v. Nah-Con-Be, 72 K. 169 (1905). **27.** In re Lewis, 67 K. 562 (1903). **28.** State v. Newcomer, 59 K. 668 (1898).

KENTUCKY

REFERENCES: Kentucky Statutes (Carroll), 1922; Supplement (Baldwin's Kentucky Statute Service), 1926; Reports through Volume 216.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Statutes. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Kentucky section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—No marriage shall be solemnized without a license therefor (2105).

b. Issuer.—License is issued by the clerk of the county in which the female resides at the time or, if she is of full age or a widow and it is issued on her application in person or in writing signed by her, by any county clerk (2105), or in his absence by the judge of the county court, who in so doing shall incur all the responsibilities of the clerk (2113). [The terms "county clerk" and "clerk of the county court" seem to apply to the same officer who acts in two capacities (1835).—G.M.] *Irregularity in the place of license issuance does not invalidate a marriage (1, 2).*

c. Compensation of Issuer.—Clerks of county courts shall receive a fee of $1.50 for the marriage license, bond, certificate and recording (1720). In counties having a population of over 75,000 the clerk of the county court turns over all fees to the auditor (1761; Const. §106), and receives an annual salary of $5000 (1762), payable monthly by the state treasurer out of the amount of fees turned in each month by such officer (1764). In counties having a population of from 40,000 to 75,000, out of the fees collected the clerk retains annually a salary of $3000 plus expenses and pays the excess over to the auditor (1776).

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—Marriage of a male under fourteen or a female under twelve years is prohibited and declared void (2097). [As to penalty for issuance of license for prohibited marriage, see 2112 under 1k. As to exception from the penalty for bigamy of a person whose first marriage was contracted under the age of consent, see 1216 under 4c.]

g. Parental Consent.—If either party is under twenty-one years and not before married, no license shall issue without consent of the father or guardian or, if he is absent, of the mother, personally given or certified in writing attested by two witnesses and proved by the oath of one of them, administered by the clerk, (2106). *A certificate purporting to give parental consent but not attested and proved as required by statute cannot be the subject of forgery because it has no legal tendency to effect a fraud* (*3*). *Penalties.* [See 2112 under 1k.] Anyone falsely personating the parent or guardian in obtaining a license shall be imprisoned not exceeding three years (2110). The marriage of a male under sixteen or female under fourteen years may be declared void if contracted without consent of the parent or guardian and not ratified by cohabitation after that age (2100). *Though the marriage of a minor over the required age may be valid regardless of fraudulent inducement without parental consent, the parent may have action for loss of services* (*4*). [Note: The court may commit to a receiver for protection the estate of a female married under sixteen years without parental consent (2116).]

h. Mental and Physical Qualifications.—Marriage of an idiot or lunatic is prohibited and declared void (2097). [As to penalty for issuance of license for prohibited marriage, see 2112 under 1k.] *The marriage of a person of unsound mind is absolutely void without legal process* (*5*). Concealment from the other party of any loathsome disease existing at the time of marriage, or contracting such afterward, is cause for divorce on suit of the party not in fault (2117). *Subsequent cohabitation is not condonation such as to estop an innocent spouse in an action against one afflicted with a loathsome disease* (*6, 7*). [Note: *Venereal disease, not known to exist at the time of promise of marriage, is a defense to an action for breach of promise* (*8, 9*).] Pregnancy of the wife by another man without the husband's knowledge at the time of marriage is cause for divorce by the husband (2117). *A husband who has had antenuptial intercourse with his wife* (*10*), *or who knew of her questionable reputation for virtue, will not be granted a divorce because of her pregnancy by a stranger at the time of marriage* (*10, 11*). *Mere premarital incontinence is no cause for divorce* (*12*).

i. Form of License.—The license authorizes the marriage, shows the names of the parties, their age, race, birthplace, residence, domestic status, and parentage, the date and place of marriage, and the occupation of the husband, and must have attached the two required certificates (2103–1). *Penalty.* For failure to see that every blank is filled in before issuing the license, the clerk is subject to a fine of from $20 to $50 (2103a).

j. Record of License.—No statutory provision. *Neither marriage license nor bond is a record, and it would be improper to record them (13).*

k. Other Provisions.—When the parties are personally unknown to the clerk, a license shall not issue until bond with good surety is given to the commonwealth, in the penalty of $100, with condition that there is no lawful cause to obstruct the marriage (2106). *Though antedating a license and bond is a great indiscretion, it is not good cause to remove the clerk from office (13). Penalties.* For knowingly issuing a license for any prohibited marriage the clerk shall be fined from $500 to $1000 and expelled from his office; for knowingly issuing a license contrary to his duty as herein prescribed he shall be fined not exceeding $1000. If the license is issued by a deputy, he [the clerk] shall be fined not exceeding $1000, and in the case of prohibited marriages shall be imprisoned not more than one year, or both (2112). [As to prohibited marriages, see 2097 under 1f, 1h, 4b, and 4c, and 2096 under 4a.]

2. SOLEMNIZATION

a. Officiant.—Marriage shall be solemnized by judges of the county court, by such justices of the peace as the Governor of the state or the county court may authorize, by ministers or priests of any denomination in regular communion with any religious society, or by religious societies having no officiating priest or minister (2103–1).

b. Officiant's Credentials.—No minister or priest shall solemnize marriage until he has obtained a license therefor from the county court of the county in which he resides, upon satisfying the court that he is of good moral character and in regular communication with his religious society, and upon giving covenant with good surety not to violate the law of this state concerning marriage, breach of which covenant is punishable by fine not exceeding $2000. Such license may be annulled by any county court (2104). *Penalty.* Any person solemnizing marriage without being authorized by a county court

shall be imprisoned for from one to twelve months, fined not more than $1000, or both (2109). *A consummated marriage solemnized before an unlicensed clergyman may not be invalid* (*14*). [See 2102 under 2f.]

c. Presentation of License.—No marriage shall be solemnized without a license therefor (2105). *Penalty.* Any person solemnizing a marriage without such license shall be imprisoned for from one to twelve months, fined not more than $1000, or both (2109).

d. Form of Ceremony.—[No general provision.] There shall never be less than two witnesses to a marriage (2107). Where either party belongs to a religious society having no officiating priest or minister whose usage is to solemnize marriages by consent given in the presence of the society, marriage may be so solemnized (2103–1).

e. Common Law Marriage.—Marriage is prohibited and declared void when not solemnized or contracted in the presence of an authorized person or society (2097). *Prior to this statute of 1852 common law marriages were valid, and non-compliance with statutory requirements did not avoid a marriage* (*15, 16, 17*). *But under existing law there can be no marriage without the proper solemnization* (*18, 19, 20, 21, 22, 23*). *Common law marriages recognized as valid where contracted will be valid in Kentucky* (*22*), *in which case a marriage may be presumed from cohabitation, acknowledgment, and reputation as husband and wife without proof of express agreement* (*22, 24*). *Cohabitation is only evidence of a common law marriage and is not necessary to complete it* (*15*).

Formerly when marriage was considered only a common law contract, if the parties to a second, bigamous marriage continued to cohabit as man and wife and were recognized as such, the presumption arose of a marriage after the death of the first spouse (*17*). *But no longer so since the common law rule has been abolished* (*20*).

f. Irregular Solemnization.—No marriage solemnized before a person professing to have authority shall be invalid for want of such authority if it is consummated with the belief of the parties, or either of them, that it is lawful (2102). *A consummated marriage is not void regardless of the officiant's lack of authority if a party thereto believed in its validity* (*14*). *Penalty.* Any unauthorized person solemnizing marriage under pretense of having authority shall be confined in the penitentiary not exceeding three years (2110). *Though a fraudulently solemnized marriage is valid, a husband pro-*

curing a mock marriage in Kentucky by one whom he knew to have no authority is guilty under this statute, an accessory before the fact being punishable as a principal (25). An Ohio justice of the peace solemnizing a marriage on a ferry-boat on the Kentucky side of the Ohio River is liable to penalty regardless of his authority in Ohio (26).

g. Other Provisions.—*Penalties.* Any authorized officiant knowingly solemnizing a marriage herein prohibited, with or without a license, shall be imprisoned for from one to twelve months, fined not exceeding $1000, or both (2111). [As to prohibited marriages, see 2097 under 1f, 1h, 4b, and 4c, and 2096 under 4a.] [Note: It shall be unlawful for anyone for compensation to solicit persons to go to any particular officiant to be married, or for such person to receive or for any officiant to divide any remuneration paid such officiant for solemnizing marriage, and anyone violating this act shall be fined from $10 to $100 (2103–1).]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—One of the two certificates the officiant shall give to the parties married (2103–1). The officiant within three months shall return the license to the issuer with a certificate of the marriage over his signature, giving the date and place of celebration and the names of two or more persons present (2107). *Penalty.* For failure to make such return he shall be fined $50 (2107).

b. Local Record.—The certificate shall be filed in the clerk's office, a register made, and an index kept (2108). *Penalty.* Failure of the clerk to discharge any duties required by law shall be contempt of court and punishable accordingly (387).

c. State Record.—No provision.

d. Evidence.—A copy of any record lodged in the clerk's office, properly attested, shall be admitted in evidence (1627), as shall the official books of a religious society (1629), the public records of other states (1636), and the properly certified foreign marriage register (1638). *The record of a marriage license and return is admissible (27) even in a bigamy prosecution (28). Foreign marriage records are evidence (17) if properly certified (29) and if there is distinct testimony that the marriage was registered in due form "according to the laws of that sovereignty" (30, 31). Where the foreign record is the original, however, no authentication is necessary (31). A copy of the marriage*

certificate with other evidence may establish a marriage (32), and a marriage will be presumed where a license issued but was never returned with the certificate if the parties subsequently cohabited and were recognized as husband and wife (33).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. If the relationship is founded upon marriage, the prohibition shall continue notwithstanding the dissolution of the marriage. Marriages prohibited by this section are incestuous and void (2096). *The marriage of a man with his uncle's widow, though once contrary to statute, was not absolutely void (2). Canonical disabilities such as relationship render a marriage voidable only (34). Penalty.* Any person marrying within the degrees herein prohibited shall be fined from $500 to $5000, and if after conviction the parties continue to cohabit, they shall be imprisoned for from three to twelve months (2114). *Carnal knowledge of a half-sister is incestuous the same as in case of a whole sister (35).*

b. Proper Civil and Racial Status.—Marriage between a white person and a Negro or mulatto is prohibited and declared void (2097). *The marriage of a white woman with a colored man is unlawful and void (36, 37). A person is a mulatto by statute if one of his grandparents was a Negro (33). Penalty.* Any party to a marriage between a white person and a Negro or mulatto shall be fined from $500 to $5000, and if after conviction the parties continue to cohabit they shall be imprisoned for from three to twelve months (2114).

c. Proper Legal Status.—Marriage of a person having a spouse living and undivorced is prohibited and declared void (2097). *The marriage of a person already married is absolutely void (17, 20, 38, 39, 40), even though the spouse has been absent for over seven years if he is in fact alive (39).* [Note: Where a marriage is contracted in good faith, with the belief of the parties that a former spouse then living was dead, the issue born before notice of the mistake shall be legitimate (2099). *A man already married who marries a blameless woman may be liable for alimony (41).*] Anyone having a living spouse who marries another shall be imprisoned for from three to nine years, unless such spouse shall have absented himself and shall not have been heard from for five years preceding, the one not knowing the other to be alive, or unless the former marriage has been or may be declared void, or was had within the age of consent (1216). *The marriage of a person already lawfully married is bigamous (14, 42) even*

if contracted in a bona fide belief that he has been divorced (28, 43, 44) or that his spouse was dead (45). A person whose spouse has been absent from the state for more than five years and not heard from within that time is lawfully competent to contract marriage (41).

A judgment of divorce authorizes either party to marry again (2118). *Formerly a divorce decree did not authorize the offending party ever to marry again or the innocent party to marry within two years (46). The statute of another state prohibiting remarriage within a period after divorce is not applicable to decrees granted in Kentucky (47). There is a strong presumption in favor of the legality of a marriage shown in fact to exist (48, 49, 50, 51).*

d. Proper Consent of Parties.—Courts may declare void a marriage obtained by force or fraud (2100). Force, duress, or fraud in obtaining the marriage is a ground for divorce on suit of the party not in fault (2117). [As to concealment of pregnancy, see 2117 under 1h.] *Marriage induced by fraud is voidable only upon personal action by the innocent party (52) for such fraud as goes to the essence of the relation (12). Examples of the fraud allowing of annulment are: concealment of a prior existing marriage (53), of pregnancy by a stranger at the time of marriage (11), and possibly of sexual malformation preventing marital relations (54), but not mere concealment of antenuptial incontinence (12). Knowledge or reasonable suspicion of the fraud by the innocent party precludes action (10, 11, 12). A marriage induced by fear of bodily harm, lacking consent, is void (55, 56), whether the duress is applied by the defendant or by the friends or relatives (56), but where the man was the cause of the woman's pregnancy he must prove that the duress only was the inducement to marriage and not the moral obligation to repair the wrong (57). Penalty.* Whoever shall take any woman unlawfully against her will, with inten to marry her or have her married to another, shall be imprisoned for from two to seven years (1158). *Subsequent voluntary cohabitation constitutes ratification of a voidable marriage (11, 12, 57, 58).*

5. STATE SUPERVISION

No provision.

6. INTERSTATE RELATIONS

Marriages of residents of this commonwealth solemnized in other states shall be valid here if valid where solemnized (2101). *The validity of a marriage is decided by the law of the place of contract*

(15, 59, 60, 61 dictum): if valid thereunder, it is valid elsewhere where the parties may be domiciled, though it would have been invalid by the law of a subsequent domicil had it been celebrated there (2, 34). Though antichristian marriages are an exception to this rule, the marriage of a man with his uncle's widow (2) or with his brother's widow is not so incestuous as to be antichristian (34). Unless a marriage would be contrary to Christian law or to the policy declared by the legislature, the court should not give a prohibition extraterritorial effect (2). The statute of another state prohibiting remarriage after divorce applies only to decrees granted in such state or to its citizens and has no extraterritorial effect on decrees granted here (47).

7. SEX OFFENSES AND MARRIAGE

Intermarriage of the parties or offer by the man to marry bars prosecution for seduction, unless within three years after marriage he deserts without cause (1214). *Proceedings in a seduction prosecution are stopped by the marriage of the parties (62, 63 dictum) or by a bona fide offer of marriage made by the seducer and refused by the woman (64, 65, 66, 67).*

KENTUCKY CASES

1. Gatewood v. Tunk, 3 Bibb 246 (1813). **2.** Stevenson v. Gray, 17 B. Mon. 193 (1856). **3.** Pearson v. Comm., 117 K. 731 (1904). **4.** Jones and Gully v. Tevis, 4 Litt. 25 (1823). **5.** Jenkins v. Jenkins' Heirs, 2 Dana 102 (1834). **6.** Hooe v. Hooe, 122 K. 590 (1906). **7.** Muir v. Muir, 133 K. 125 (1909). **8.** Shackleford v. Hamilton, 93 K. 80 (1892). **9.** Gardner v. Arnett, 21 Ky. L. Rep'r. 1 (1899); 50 S.W. 840. **10.** Steele v. Steele, 96 K. 382 (1895). **11.** Stewart v. Stewart, 13 Ky. L. Rep'r. 46 (1891). **12.** Wesley v. Wesley, 181 K. 135 (1918). **13.** Comm. v. Rodes, 1 Dana 595 (1833). **14.** Robinson v. Comm., 6 Bush 309 (1869). **15.** Dumaresly v. Fishly, 3 A.K. Marsh 368 (1821). **16.** Ewing v. Bibb, 7 Bush 654 (1871). **17.** Donnelly v. Donnelly's Heirs, 8 B. Mon. 113 (1847). **18.** Estill v. Rogers, 1 Bush 62 (1866). **19.** Stewart v. Munchandler, 2 Bush 278 (1867). **20.** Harris v. Harris, 85 K. 49 (1887).

21. Robinson v. Redd's Adm'r, 19 Ky. L. Rep'r, 1422 (1897); 43 S.W. 435. **22.** Klenke v. Noonan, 118 K. 436 (1904). **23.** McDaniel v. McDaniel, 212 K. 833 (1926). **24.** Scott v. Scott, 200 K. 153 (1923). **25.** Barclay v. Comm., 116 K. 275 (1903). **26.** McFall v. Comm., 2 Metc. 394 (1859). **27.** Powell v. Calvert, 5 Ky. L. Rep'r. 769 (1884). **28.** Rice v. Comm., 31 Ky. L. Rep'r. 1354

(1907); 105 S.W. 123. **29.** Adkins v. Bently, 177 K. 616 (1917). **30.** Faustre v. Comm., 92 K. 34 (1891). **31.** Apkins v. Comm., 148 K. 662 (1912). **32.** Walsh Construction Co. v. Domazet, 216 K. 140 (1926). **33.** McGoodwin v. Shelby, 182 K. 377 (1918). **34.** Dannelli v. Dannelli's Adm'r., 4 Bush 51 (1868). **35.** Burdue v. Comm., 144 K. 428 (1911). **36.** Armstrong v. Hodges, 2 B. Mon. 69 (1841). **37.** Moore v. Moore, 30 Ky. L. Rep'r. 383 (1907); 98 S.W 1027. **38.** Steele v. Steele, 13 Ky. L. Rep'r. 45 (1891). **39.** Baker v. Gibson, 32 Ky. L. Rep'r. 498 (1907); 106 S.W. 253. **40.** Bates v. Meade, 174 K. 545 (1917).

41. Strode v. Strode, 3 Bush 227 (1867). **42.** Johnson v. Comm., 86 K. 122 (1887). **43.** Davis v. Comm., 13 Bush 318 (1877). **44.** Rogers v. Comm., 24 Ky. L. Rep'r, 119 (1902); 68 S.W. 14. **45.** Cornett v. Comm., 134 K. 613 (1909). **46.** Cox v. Combs, 8 B. Mon. 231 (1848). **47.** Sparks v. Sparks, 215 K. 508 (1926). **48.** Howton v. Gilpin, 24 Ky. L. Rep'r. 630 (1902); 69 S.W. 766. **49.** Tompkins v. Comm., 117 K. 138 (1903). **50.** Scott's Adm'r. v. Scott, 25 Ky. L. Rep'r. 1356 (1904); 77 S.W. 1122. **51.** Rockcastle Mining etc. Co. v. Baker, 167 K. 66 (1915). **52.** Tomppert's Ex'rs. v. Tomppert, 13 Bush 326 (1877). **53.** Brockle v. Brockle, 7 Ky. L. Rep'r. 747 (1886). **54.** Mutter v. Mutter, 123 K. 754 (1906). **55.** Bassett v. Bassett, 9 Bush 696 (1873). **56.** Marks v. Crume, 16 Ky. L. Rep'r. 707 (1895); 29 S.W. 436. **57.** Shepherd v. Shepherd, 174 K. 615 (1917). **58.** Glass v. Glass, 7 Ky. Op. 623 (1874). **59.** Leonard v. Braswell, 99 K. 528 (1896). **60.** Potter v. Stanley, 187 K. 292 (1920). **61.** Hughes v. Hughes, 211 K. 799 (1925). **62.** Comm. v. Hodgkins, 111 K. 584 (1901). **63.** Comm. v. Israel, 111 K. 608 (1901). **64.** Comm. v. Wright, 16 Ky. L. Rep'r. 251 (1890); 27 S.W. 815. **65.** Ingram v. Comm., 114 K. 726 (1903). **66.** Comm. v. Akers, 28 Ky. L. Rep'r. 78 (1905); 88 S W. 1108. **67.** Walling v. Comm., 211 K. 49 (1925).

LOUISIANA

REFERENCES: Constitution of Louisiana, 1921; Revised Civil Code of Louisiana (Merrick), 1925; Constitution and Statutes of Louisiana (Wolff, three volumes), 1920; Marr's Annotated Revised Statutes of Louisiana, 1915, and Supplement, 1926; Acts of Louisiana, 1920, 1921 (extra session), 1922, 1924, 1926; Reports through Volume 160 Louisiana and Volume 4, Louisiana Appeals.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to official citations as noted in each instance—that is, to the articles of the Civil Code, to the sections of the Revised Statutes of 1870, or to the session laws, in the latter cases the page reference to such statutes and acts in Wolff's and Marr's compilations being included for easy reference. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Louisiana section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Licenses to celebrate marriages shall be granted (C.C. 99). [As to officiant requiring a license before solemnizing a marriage, see C.C. 104 under 2c.] *Under the code absence of a license does not affect the validity of a marriage (1, 2, 3, 4, 5).*

b. Issuer.—Licenses for marriages in the Parish of Orleans shall be granted by the Board of Health and judges of the city courts; in other parishes by the clerks of courts, unless the clerk himself be a party to the marriage, when the license shall be granted by the district judge (C.C. 99). Licenses can only be granted by the authorized issuer in the parish in which one at least of the parties is domiciliated (C.C. 100). *Procurance of a license in the wrong parish does not invalidate a duly solemnized marriage (5).*

c. Compensation of Issuer.—Clerks of district courts, except in the Parish of Orleans—and clerks of the city courts of New Orleans

(Act 136 of 1880, §11—Wolff, p. 380)—shall receive a fee of $2.00 for issuing each license (Act 203 of 1898, §2—Wolff, pp. 369 ff.). Clerks of district courts, except in five parishes and the Parish of Orleans, shall receive as exclusive compensation annual salaries paid out of the Clerks' Salary Fund, into which are turned all their fees (Act 14 of 1918, §§1, 3—Wolff, pp. 236 ff.; Marr, Sup. p. 259), and in 48 other parishes clerks shall receive their fees alone as full compensation (Act 183 of 1924—Marr, Sup. p. 264). Judges of city courts in New Orleans receive an annual salary as sole compensation (Const. Art. VII, §90; Act 160 of 1910, §2—Marr, Sup. p. 1337; Act 136 of 1918, §29, as amended Act 96 of 1921—Marr, Sup. p. 1163; Act 195 of 1926). [The recorder of the Board of Health of New Orleans, who issues licenses for that board, is compensated solely by salary fixed by the commission council of the city of New Orleans.—G.M.]

d. Personal Appearance by Candidates.—No provision. [*Note: If both the parties are before the clerk he may be justified in acting on appearances as to age* (*6*).]

e. Advance Notice and Objections.—No statutory provision as condition to license issuance. [As to objections to celebration of a marriage, see C.C. 106 ff. under 2g.]

f. Minimum Age.—No statutory provision as condition to license issuance. [As to minimum ages below which officiants are forbidden to solemnize marriage, see C.C. 92 under 2g.]

g. Parental Consent.—A minor of either sex who has attained the competent age to marry must furnish proof to the license issuer of the consent of his father or mother or the survivor of them or, if they are both dead, of his tutor (C.C. 97). [Note: Minors are those of both sexes under twenty-one years (C.C. 37).] Applicants who have attained the age of majority must furnish the license issuer proof thereof (C.C. 98). *The kind of proof required is such as is necessary to convince a reasonable man; it need not be written and is very much in the discretion of the clerk in each case* (*6*). *The issuer is not authorized to administer an oath as to parental consent* (*7*). Marriage of minors without consent of the father and mother cannot for that cause be annulled if otherwise contracted as prescribed by law, but want of consent shall be good cause for the parents to disinherit their children thus married (C.C. 112). *Want of parental consent to the marriage of a minor is not ground for annulment* (*8, 9, 10*) *and is not a legal impediment causing forfeiture of the bond of the intended husband* (*8*).

See C.C. 101 under 1k.] *Though the law does not declare void the marriage of a minor solemnized in another state without the required consent, such marriage does not emancipate the minor as would a legally authorized marriage (11, 12, 13), does not confer all marital rights, such as dowry (14), and may be punished by disinheritance (15).*

h. Mental and Physical Qualifications.—All males within fifteen days prior to license application shall be examined as to the existence of any venereal disease, and it shall be unlawful for any officer to issue license to any person failing to file a certificate stating his freedom from venereal diseases so nearly as can be determined by a physician's examination and the application of specified tests when necessary (Act 164 of 1924, §1—Marr, Sup. pp. 1102 ff.). Such examiners shall be duly licensed physicians, whose fees shall not exceed $2.00. Health officers and asylum physicians will examine indigent applicants free of charge (*Ibid.*, §2). *Penalties.* Any officer unlawfully issuing a license to any person failing to present the certificate, any party disclosing any fact pertaining to the examination of any applicant except as required by law (*Ibid.*, §3), or any physician knowingly making any false statement in the certificate, shall be fined not more than $100 or imprisoned not more than six months (*Ibid.*, §4). *Insanity arising subsequent to marriage is not ground for annulment (16), and premarital insanity is not a basis for contesting the marriage after the death of the person alleged to have been insane unless the interdiction was petitioned for before his death (17).*

i. Form of License.—The license, issued in duplicate, is directed to the officiant, authorizing him to celebrate the marriage (C.C. 104).

j. Record of License.—Clerks of the court in the country parishes of the state shall keep a record of all licenses issued, which record shall be open to public inspection and shall show the date of issue, the names, ages, residence, and relationship of the parties, whether previously married and, if so, the name of the former spouse and whether such spouse is living, and the names and residence of the parents (Act 104 of 1912—Wolff, p. 1140; Marr, p. 1554).

k. Other Provisions.—Before granting a license the issuer shall require of the intended husband a bond, with surety in a sum proportioned to his means, with condition that there exists no legal impediment to the marriage. The duration of the security is limited to two years (C.C. 101). *The only authority given the clerk is to require such bond (6, 7); he is under no legal duty to administer oaths as to the legality of the marriage (6), and false swearing on such oath is not*

perjury (7). Neglect of a clerk to require such bond does not render null a marriage performed by virtue of the license (5). The impediments contemplated by the provision for bond are only those which would cause the nullity of the marriage (8). [This has been questioned (6).] No issuer shall grant a license without receiving an affidavit from one of the parties stating that they are not related within the degrees prohibited (C.C. 95). [As to the degrees prohibited, see C.C. 94, 95 under 4a.] Before issuing a license to marry a person who resides and intends to continue to reside in another state, the issuer shall satisfy himself by affidavits or otherwise that such person is not prohibited from marrying by the laws of the place of his residence (Act 151 of 1914—Wolff, p. 1140; Marr, p. 1553—§3). *Penalty.* Any official issuing a license with knowledge that the parties are prohibited from intermarrying shall be guilty of a misdemeanor and fined or imprisoned or both in the discretion of the court (Act 151 of 1914, §4).

2. SOLEMNIZATION

a. Officiant.—Marriage may be celebrated, upon complying with the regulations of the law, by any minister or priest, whether a citizen of the United States or not (C.C. 102), in any parish of the state, though he be not a resident of the parish (R.S. 2209—Wolff, p. 1138); by parish judges and justices of the peace, within their respective parishes (C.C. 103); by judges of district and parish courts, under the same regulations as prescribed for justices of the peace (R.S. 2207—Wolff, p. 1138; Marr, p. 1548); by city judges (Act 128 of 1920—Marr, Sup. p. 1101); and, in the Parish of West Feliciana, by regularly commissioned notaries of that parish (R. S. 2211—Wolff, p. 1138; Marr, p. 1548). [*Note: A marriage solemnized by the proper authorities in a parish different from that of the parties' domicil is valid if it would be legal at their domicil (18).*]

b. Officiant's Credentials.—No provision.

c. Presentation of License.—No officiant shall celebrate any marriage without a special license directed to him by the license issuer of the parish wherein such marriage is to be celebrated, authorizing him to solemnize the same (C.C. 104). *Penalty.* All violations shall be punished by a fine not exceeding $1000 (R.S. 2206—Wolff, p. 1138; Marr, p. 1548).

d. Form of Ceremony.—Marriage must be celebrated in the presence of three witnesses of full age (C.C. 105). *Penalty.* All viola-

tions shall be punished by a fine not exceeding $1000 (R.S. 2206—Wolff, p. 1138; Marr, p. 1548). *The fact that only two witnesses signed the marriage register when three were in fact present does not affect the validity of the marriage (4). Indians having no tribal recognition cannot contract marriage according to the Indian custom (19).*

e. Common Law Marriages.—Such marriages only are recognized by law as are contracted and solemnized according to the rules which it prescribes (C.C. 88). *The civil code does not recognize marriages by private agreement or as resulting from cohabitation as man and wife (20): a marriage must be contracted as required (19). There were dicta in earlier cases that the statutes relating to forms and ceremonies were directory only and did not declare a marriage null if otherwise valid (1, 3, 21). [But these decisions actually involved proof of marriage, not creation of marriage.—G.M.] When Louisiana was a Spanish colony the decree of the Council of Trent did not extend to it, and a religious celebration was not necessary to the validity of a marriage (22, 23).*

f. Irregular Solemnization.—No provision.

g. Other Provisions.—In case of an opposition to a marriage, supported by the oath of the party making it and by reason sufficient in the opinion of the judge to authorize a suspension of the marriage, the parties shall be notified and a day assigned for a hearing (C.C. 106), not more than ten days from the day on which the opposition shall have been made (C.C. 107). Any person may make opposition to a marriage, but if the opposition be overruled the party making it shall pay costs (C.C. 108). *Penalty.* Any authorized officiant knowingly celebrating a marriage of a non-resident prohibited by the law of his domicil from marrying shall be guilty of a misdemeanor and punished by fine or imprisonment or both in the discretion of the court (Act 151 of 1914—Wolff, p. 1140—§4). Officiants are prohibited to marry males under fourteen and females under twelve years (C.C. 92). *Penalty.* If any officiant is convicted of having married such persons he shall be removed from his office, if a magistrate, or deprived forever of the right of celebrating marriages, if a minister (C.C. 92). [As to prohibition of solemnizing miscegenetic marriages, see C.C. 94 and Act 220 of 1920 under 4b.]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—An act must be made of the celebration, signed by the officiant, the parties, and the witnesses, which

act must be made in duplicate and appended to the license issued in duplicate; one of the copies, appended to the license, must be returned by the officiant to the issuer within thirty days from the date of the celebration (C.C. 105). *Where a party gave free verbal consent, a marriage is not void for his failure to sign the marriage record* (*24*). In the Parish of Orleans return is made to the president of the Board of Health (Act 80 of 1877—Marr, p. 190). *Penalty.* All violations of C.C. 105 shall be punished by a fine not exceeding $1000 (R.S. 2206—Wolff, p. 1138; Marr, p. 1548).

b. Local Record.—The issuer shall file and record the license in his office, when returned with the certificate by the officiant (C.C. 105). Whenever returns are made of licenses issued, the clerk shall make a notation of the said record of licenses issued, showing the date of the marriage and of the return thereof made by the officiant (Act 104 of 1912—Wolff, p. 1140; Marr, pp. 1554 f.). *Penalty.* Any civil officer wilfully failing to perform any official duty required by law shall be punished by fine not exceeding $500, by imprisonment not exceeding six months, or both (Act 254 of 1912—Wolff, pp. 435 f.; Marr, p. 617).

c. State Record.—All judges of the city courts, justices of the peace, clerks of district courts, and health officials throughout the state shall return annually to the secretary of the State Board of Health an abridged statement of all marriage licenses issued by them, specifying: the number and date of the license; names, residence, color, age, and occupation of each party; date, place, and officiant of the marriage; number of former marriages and divorces; and names of parents or guardians where either party is under age (Act 125 of 1910—Wolff, p. 1141; Marr, pp. 1553 f.—§1). The secretary of the State Board of Health annually shall prepare from said returns abstracts relating to marriage in each parish (*Ibid.*, §3). *Penalty.* Any officer neglecting to make such returns shall forfeit for each offense $100 for the use of the proper parish (*Ibid.*, §2).

d. Evidence.—No statutory provision. *Since the statute requires return and record of the duplicate license and certificate, one seeking to prove a marriage should produce a certified copy of the public record* (*25*) *unless proved to have been lost or destroyed* (*25, 26*). *A copy of a license and certificate of marriage in another state, properly certified and authenticated by the person required by law to keep the record, is admissible in civil cases* (*27*) *and in criminal prosecutions* (*28, 29, 30, 31*). *If not properly authenticated, it may yet be introduced with other evidence* (*5*). *A marriage is adequately proved by an entry in a family*

Bible, plus corroborating evidence, made before official records were kept (32). A certificate of marriage is proper evidence (33) of the particular facts required by law to be recorded in it (21), but a purported certificate not proved and never recorded (34), or made long after the alleged marriage, is not evidence (35).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (C.C. 94, 95). *A marriage is void between an uncle and a niece (36) or half-niece, the daughter of his half-brother (37).* No marriage contracted in contravention of the above provisions in another state by citizens of this state, without first having acquired a domicil out of this state, shall have any legal effect here (C.C. 94, 95). [Note: All other impediments on account of relationship or affinity are abolished (C.C. 96).] Such a marriage may be impeached either by the married persons themselves, by the person interested, or by the Attorney General (C.C. 113). [As to prohibition of issuance of license for consanguineous marriages, see C.C. 95 under 1k.] *Penalties.* Whoever shall knowingly intermarry, being within the degrees of consanguinity within which marriage is prohibited by Arts. 94 and 95, shall be imprisoned for from ten to twenty years (Act 78 of 1884—Wolff, pp. 389 f.; Marr, p. 546). Incest is punishable by imprisonment for life (R.S. 789—Wolff, p. 389). *Incest was not a crime at common law or by statute in Louisiana until 1884 (38). The statute punishing incest does not include the relationship of cousins, it being applicable only to the marriage law as it stood at the time of its enactment and the provision as to cousins being added later (39).* Any person remaining domiciled in this state who, in another state whence he has gone for the purpose, contracts a marriage prohibited in this state on account of relationship, and returns here to reside permanently, shall be imprisoned for from six months to one year, and fined from $100 to $500 (Act 180 of 1906—Wolff, pp. 397 f.; Marr, p. 548).

b. Proper Civil and Racial Status.—Marriage between white persons and persons of color is prohibited, and celebration of such a marriage is null and void (C.C. 94). *Though by an early statute miscegenetic marriages were voidable only in a direct action (40), under later and existing law such marriages are absolutely void and subject to collateral attack (41, 42, 43, 44, 45). "Persons of color" includes those belonging in whole or in part to the African race (46).* No marriage contracted in contravention of the above provisions in another state by citizens of this state, without first having acquired a domicil

out of this state, shall have any legal effect here (C.C. 95). [As to impeachment of such marriage, see C.C. 113 under 4a.] *The marriage of a white person and a Negro, though prohibited here, is recognized if validly contracted at the parties' domicil* (*47*). *Penalty.* Concubinage between persons of the Caucasian and colored races is a felony, punishable by imprisonment of from one month to one year (Act 206 of 1910—Wolff, p. 398; Marr, p. 546). [Inasmuch as marriage between the races is of no effect, any cohabitation thereunder would be punishable as concubinage.—G.M.] Marriage between persons of the Indian race and persons of the colored and black race is prohibited, and the celebration of any such marriage is null and void (Act 220 of 1920; Marr, p. 1102). *Penalty.* Concubinage between a person of the Indian race and one of the colored or black race is a felony, punishable by imprisonment of from one month to one year (Act 230 of 1920; Marr, p. 396).

c. Proper Legal Status.—Persons legally married are, until a dissolution of the marriage, incapable of contracting another, under the penalties established (C.C. 93). *The marriage of a party to a prior, subsisting marriage is an absolute nullity* (*48*, *49*, *50*, *51*), *as is a marriage after a divorce from bed and board* (*52*). Ten years' absence, without any news of the absentee, is sufficient cause for the spouse of such absentee to contract another marriage, after having been authorized to do so by the judge. The spouse who was absent returning after such marriage may remarry, and the marriage entered into on account of the absence shall remain valid (C.C. 80). *Nothing short of ten years' absence creates the legal presumption of death or the presumption of the prima facie validity of a later marriage of the absentee's spouse* (*53*). Any married person marrying again, the former spouse being alive, shall pay a fine not exceeding $500 and be imprisoned not exceeding two years, unless such former spouse shall have absented himself for five years, the one not knowing the other to be living within that time, or unless the person remarrying has been divorced or the former marriage declared void (R.S. 800—Wolff, p. 393; Marr, pp. 545 f.). Bigamy is punishable by imprisonment of from one to five years (Act 93 of 1898—Wolff, p. 393; Marr, p. 545). *The defendant in a bigamy prosecution has the burden of proving himself within an exception to the statute* (*28*), *and if he relies upon an honest belief in the dissolution of the prior marriage he must prove the fact of so believing and reasonable grounds therefor* (*54*). A married person to whose prejudice a second marriage has been contracted can sue for the nullity thereof, even during the life of the other party to the first marriage (C.C. 116), and a bigamous mar-

riage may be impeached by the parties, by any person interested, or by the Attorney General (C.C. 113).

The wife shall not contract another marriage until ten months after the dissolution of her preceding marriage (C.C. 137). The guilty party to a divorce for adultery can never marry his accomplice, under penalty of being considered guilty of bigamy, and of nullity of the new marriage (C.C. 161). *The marriage of the guilty party with his accomplice in adultery is void (55, 56, 57) and bigamous (57) where there has been an actual divorce (17) and the accomplice has been designated in the divorce petition (57, 58) or in evidence upon such petition, for which cause the divorce is granted (58).*

d. Proper Consent of Parties.—The law considers marriage as a civil contract (C.C. 86) and sanctions all those marriages where the parties at the time of making them were willing and able to contract, and did contract pursuant to the forms prescribed by law (C.C. 90). [Note: No marriage can be contracted or celebrated by procuration (C.C. 109). *This prohibition extends only to marriages contracted within the state and not to marriages validly contracted elsewhere by proxy (59).*] No marriage is valid to which the parties have not freely consented. Consent is not free: when given to a ravisher, unless given by the party ravished after restoration to liberty; when extorted by violence; when there is a mistake respecting the person whom one of the parties intended to marry (C.C. 91). Such marriages may be annulled by the party who failed of consent or was mistaken, if not condoned by cohabitation after recovery of liberty or discovery of mistake (C.C. 110, 111). *The mistake sufficient for annulment is not one as to character, attributes, condition, or previous habits, such as lack of chastity (10). A marriage procured by violence and threats is voidable for duress (9, 60, 61, 62) if not ratified by voluntary consummation condoning the violence (63, 64) after cessation of the coercion (62). But mere threats of action authorized by law (9), desire to avoid prosecution for bastardy (65), or reluctance of consent by a man who believed himself the cause of the woman's ruin, do not allow of annulment (66). Penalty.* A person taking a female against her will with intent to compel her marriage is punishable (Act 307 of 1910—Marr, pp. 543 f.—§1) by imprisonment of from one to ten years (*Ibid.*, §3).

5. STATE SUPERVISION

The report of all licenses issued shall be made to the State Board of Health on blanks provided by said board (Act 125 of 1910—Wolff, p. 1141; Marr, pp. 1553 f.—§1).

6. INTERSTATE RELATIONS

If any resident of this state, intending to continue so resident, who is prohibited from marrying by the laws of this state, shall go into another jurisdiction and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void in this state as if contracted here (Act 151 of 1914—Wolff, p. 1140; Marr, pp. 1552 f.—§1). No marriage shall be contracted in this state by a resident of another jurisdiction intending to continue so resident, if such marriage would be void if contracted in such other jurisdiction, and every such marriage celebrated in this state shall be null and void (*Ibid.*, §2). [As to issuer of license requiring proof of non-domiciliaries that their marriage is not prohibited, and as to penalties upon issuer and officiant knowingly assisting in such marriages, see §§3 and 4 of the above act under 1k and 2g.] No marriage in contravention of the prohibitions of relationship or of race (white and colored) contracted in another state by citizens of this state still domiciled in this state shall have any legal effect here (C.C. 94, 95). Marriages contracted before 1912 by parties either or both then and afterwards domiciled in this state and prohibited by its laws from intermarrying because within the prohibited degrees shall nevertheless be deemed valid in this state if valid where celebrated. Such marriages, if contracted after 1912, shall not be deemed valid in this state if the parties return here to reside permanently (C.C. 113). *The rule that a marriage valid where contracted is valid everywhere is subject to exceptions where the marriage is antichristian or contrary to the public policy of the law-making body (57, 59). A marriage by proxy is not antichristian (59). The marriage of a white person and a Negro, prohibited in Louisiana, is valid here if validly contracted at the place of the parties' domicil (47) but is void here, though valid where contracted, if the parties were domiciled at the time in Louisiana (41). [Note: The penal statute of another state prohibiting remarriage after divorce has no effect on a marriage there solemnized between parties intending to reside in this state thereafter and actually residing here (58).]*

7. SEX OFFENSES AND MARRIAGE

Marriage is no defense to the crime of pandering (Act 307 of 1910, §11—Marr, p. 545). *The subsequent marriage of the defendant and the injured girl is no defense to the crime of carnal knowledge of a female between twelve and eighteen years (67).*

LOUISIANA CASES

1. Holmes v. Holmes, 6 L. 463 (1834). **2.** Hart v. Hoss and Elder, 26 Ann. 90 (1874). **3.** Sabalot v. Populus, 31 Ann. 854 (1879). **4.** Landry v. Bellanger, 120 L. 962 (1908). **5.** State v. Trull, 147 L. 444 (1920). **6.** Barnidge v. Kilpatrick, 111 L. 587 (1904). **7.** State v. Theriot, 50 Ann. 1187 (1898). **8.** State v. Dole and Ball, 20 Ann. 378 (1868). **9.** Lacoste v. Guidroz, 47 Ann. 295 (1895). **10.** Delpit v. Young, 51 Ann. 923 (1899). **11.** Maillefer v. Saillot, 4 Ann. 375 (1849). **12.** Babin v. Le Blanc, 12 Ann. 367 (1857). **13.** Guillebert v. Grenier, 107 L. 614 (1902). **14.** Le Breton v. Nouchet, 3 Mart. (O.S.) 60 (1813). **15.** Bosworth v. Beiller, 2 Ann. 293 (1847). **16.** Ryals v. Ryals, 130 L. 244 (1912). **17.** Ducasse's Heirs v. Ducasse, 120 L. 731 (1908). **18.** Succession of Colwell, 34 Ann. 265 (1882). **19.** Sesostris Youchican v. Texas and P. Ry. Co., 147 L. 1080 (1920). **20.** Johnson's Heirs v. Raphael, 117 L. 967 (1906).

21. Succession of Hubee, 20 Ann. 97 (1868). **22.** Patton v. Philadelphia, 1 Ann. 98 (1846). **23.** Succession of Prevost, 4 Ann. 347 (1849). **24.** Duvigneaud v. Loquet, 131 L. 568 (1912). **25.** Green v. New Orleans, S. and G.I.R. Co., 141 L. 120 (1917). **26.** Clapier v. Banks, 10 L. 60 (1836). **27.** Succession of Taylor v. Taylor, 15 Ann. 313 (1860). **28.** State v. Barrow, 31 Ann. 691 (1879). **29.** State v. Allen, 113 L. 705 (1904). **30.** State v. Marks, 127 L. 1031 (1911). **31.** State v. Bischoff, 146 L. 748 (1919–20). **32.** Succession of Curtis, 109 So. 832 (1926) **33.** Willis v. Kern, 21 Ann. 749 (1869). **34.** Eames v. Woodson, 120 L. 1031 (1908). **35.** Gaines v. Relf, 12 How. (U.S.) 472 (1851). **36.** Succession of Buissiere, 41 Ann. 217 (1889). **37.** State v. Guiton, 51 Ann. 155 (1898). **38.** State v. Smith, 30 Ann. 846 (1878). **39.** State v. Couvillion, 117 L. 935 (1906). **40.** Boyer v. Tassin, 9 Ann. 491 (1854).

41. Dupre v. Executor of Boulard, 10 Ann. 411 (1855). **42.** Succession of Minvielle v. Barjac, 15 Ann. 342 (1860). **43.** Succession of Dreux, Man. Unrep. Cas. 217 (1880). **44.** Carter v. Veith, 139 L. 534 (1916. **45.** Succession of Mingo, 143 L. 298 (1917). **46.** State v. Treadaway, 126 L. 300 (1910). **47.** Succession of Caballero v. Executor, 24 Ann. 573 (1872). **48.** Patterson v. Gaines, 6 How. (U.S.) 550 (1847). **49.** Summerlin v. Livingston, 15 Ann. 519 (1860). **50.** Lutenbacher v. Loscher, 37 Ann. 831 (1885). **51.** Monnier v. Contejean, 45 Ann. 419 (1893). **52.** Carmena v. Blaney, 16 Ann. 245 (1861). **53.** McCaffrey v. Benson, 38 Ann. 198 (1886). **54.** State v. Cain, 106 L. 708 (1902). **55.** Knaps v. Graunard, 10

Rob. 21 (1845). **56.** Succession of Taylor, 39 Ann. 823 (1887). **57.** Succession of Gabisso, 119 L. 704 (1907). **58.** Succession of Hernandez, 46 Ann. 962 (1894). **59.** U.S. ex rel. Modianos v. Tuttle, 12 Fed. (2d) 927 (1925). **60.** Quealy v. Waldron, 126 L. 258 (1910). **61.** Simmons v. Stevens, 132 L. 675 (1913). **62.** Fowler v. Fowler, 131 L. 1088 (1913). **63.** Boutterie v. Demarest, 126 L. 278 (1910). **64.** Thompson v. Thompson, 148 L. 499 (1921). **65.** Pray v. Pray, 128 L. 1037 (1911). **66.** Collins v. Ryan, 49 Ann. 1710 (1897). **67.** State v. Dejean, 159 L. 900 (1925).

MAINE

REFERENCES: Revised Statutes of Maine, 1916; Laws of Maine, 1917, 1918 (special session), 1919, 1921, 1923, 1925, 1927; Reports through Volume 125.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to chapters and sections of the Revised Statutes and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Maine section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Persons intending to be joined in marriage shall cause notice of their intention to be recorded (ch. 64, §4, as amended L. 1917, ch. 100); and a certificate of intention shall be delivered to the officiant (ch. 64, §5). Marriages among Friends are not affected by this provision (ch. 64, §11). [The license is called a certificate of intention to marry.—G.M.] *Though a certificate of intention is not obtained as required (1) or the banns not published, a duly solemnized marriage is valid notwithstanding (2).*

b. Issuer.—Notices of intention are recorded in the office of the clerk of the town in which each party resides, or where one resides if only one is a resident of the state, and if there is no clerk in the place of residence, then with the clerk of an adjoining town, and if both are non-residents then with the clerk of the town in which the marriage is to be solemnized (ch. 64, §4, as amended L. 1917, ch. 100).

c. Compensation of Issuer.—For entering and recording intentions of marriage and giving certificates of such notices, the clerks of cities and towns receive $1.00 (ch. 118, §20). [Clerks retain fees as their compensation.—G.M.]

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—Candidates shall file notice of intention to be married at least five days before a certificate of such intention is granted, except where, upon application, the judge of probate or the justice of a police or municipal court or trial justice grants a certificate that it is expedient that the marriage be solem-

nized without delay, or in extraordinary cases when death of either party is imminent, upon request of a minister or physician, or where either party has arrived as a foreign immigrant within five days (ch. 64, §4, as amended L. 1917, ch. 100). Any person believing that either party cannot lawfully contract marriage may file a caution, with reasons, with the issuer, who shall withhold the certificate until decision approving the marriage is made by two justices of the peace, delivered if possible within seven days (ch. 64, §9). [See L. 1919, ch. 41, §2, under 1h.]

f. Minimum Age.—[No specific provision as condition to license issuance.] Marriage may be annulled for nonage (ch. 65, §16). [As to common law ages of consent see Introduction, page 9.]

g. Parental Consent.—No certificate of intention shall be issued to a male under twenty-one or to a female under eighteen years without the written consent of their parents or guardians, if they have any living in the state (ch. 64, §5). *Penalty.* For intentional violation of this provision the clerk forfeits $20 (ch. 65, §5). *Lack of parental consent, though creating a pecuniary penalty, does not invalidate a marriage contracted here (2) or in another state unless the statute there declares it cause for absolute nullity (3).*

h. Mental and Physical Qualifications.—[No specific provision as condition to license issuance.] No insane or feeble-minded person or idiot is capable of contracting marriage (ch. 64, §2, as amended L. 1917, ch. 40), and such marriage if solemnized within this state is absolutely void without legal process (ch. 65, §1). *The marriage of an insane person, being absolutely null, is subject to collateral attack (4, 5). The law does not distinguish between various grades of mental imbecility (6); to be competent to marry one must have the degree of mind sufficient to enter into a valid contract or make a valid deed or will (7) and must understand that one takes upon oneself the duties and responsibilities of that relation (6).*

No person having syphilis shall marry until he has a physician's certificate that he is cured (L. 1919, ch. 41, §1). A physician learning that a syphilitic patient has filed marriage intentions shall notify the local board of health who are empowered to notify the intended spouse (*Ibid.*, §2). *Penalty.* A person failing to comply, or a physician making false certificate, is punishable by imprisonment of from three months to one year, fine of from $200 to $500, or both (*Ibid.*, §3). *Pregnancy of the wife by another man at the time of marriage, fraudulently ascribed to the husband, is ground for annulment (8).*

i. Form of License.—The certificate of intention shall state the penalty for an unauthorized person solemnizing a marriage and specify the date when the intentions were entered, and shall contain a blank form for the return to the clerk, with space for date of issuance of the officiant's license (ch. 64, §§5 and 6).

j. Record of License.—Notices of intention are recorded in a book open to public inspection (ch. 64, §4, as amended L. 1917, ch. 100).

k. Other Provisions.—No certificate of intention shall be issued to a town pauper when the overseers of such town deposit a list of their paupers with the clerk (ch. 64, §5). *Penalty.* For intentional violation or false statement of residence such clerk forfeits $20 (ch. 64, §5).

Penalties. A town clerk delivering a certificate knowing it to be false in any particular shall be fined $100 or imprisoned six months (ch. 64, §17). Whoever makes false representations to procure a certificate forfeits $100 (ch. 64, §7).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by every justice of the peace and notary public; by women, otherwise eligible, appointed by the governor with the consent of the council; by every ordained minister of the gospel engaged in the service of the religious body to which he belongs, or person licensed to preach by an association of ministers, religious seminary, or ecclesiastical body, whether a resident or non-resident of the state and of either sex, when properly licensed (ch. 64, §12); and among Quakers or Friends according to their forms (ch. 64, §11). *The legislature may authorize the appointment of women to solemnize marriages (9). Under a former statute a marriage was void if not solemnized by a "stated and ordained minister" in the town in which he and at least one party resided (10, 11).*

b. Officiant's Credentials.—A license authorizing a minister or preacher to solemnize marriages, good until revoked by the Governor for cause, is issued by the Secretary of State upon the facts being properly certified to by any municipal officer of the town where the minister resides or where the ceremony is to be performed (ch. 64, §12). [*Note: The certificate of the Secretary of State, not being made legal evidence by statute, is not admissible in a judicial proceeding (12).*]

c. Presentation of License.—The certificate of intention shall be delivered to the officiant before he begins to solemnize the marriage

(ch. 64, §5). *Penalty.* See ch. 64, §13, under 2g. *Though solemnization without the required certificate of intention subjects the officiant to a penalty, the marriage, if otherwise proper, is valid (1).*

d. Form of Ceremony.—[No general provision.] Marriages may be solemnized among Friends in the form heretofore practiced in their meetings (ch. 64, §11).

e. Common Law Marriage.—[No statutory provision as to validity.] *Penalty.* Whoever contracts a marriage contrary to this chapter forfeits $100 (ch. 65, §7). *It is doubtful whether a doctrine so broad as to hold that a marriage contract* per verba de praesenti *amounts to actual marriage would be sanctioned in this state (13). Where a woman already married, married again, it will not be presumed that there was a remarriage of the parties to the second union after removal of the impediment, the events all being of recent date and no knowledge of the removal of the disability being shown (14).*

f. Irregular Solemnization.—The validity of a marriage solemnized before any known inhabitant of the state professing to be an authorized officiant shall not be affected on account of any want of authority in such person, or by any omission or informality in entering the intention of marriage, if the marriage was otherwise lawful and consummated with the belief of either party that they were lawfully married (ch. 64, §16). *Penalty.* A person not authorized joining others in marriage shall be imprisoned not exceeding five years or fined not exceeding $1000 (ch. 64, §14).

g. Other Provisions.—*Penalties.* Whoever knowingly joins persons in marriage contrary to this chapter shall be fined $100 and be forbidden to join persons in marriage thereafter (ch. 64, §13). Whoever makes false representations to procure the solemnization of marriage contrary to this chapter forfeits $100 (ch. 64, §7).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—Within six days after the marriage the officiant shall deliver a record thereof to the clerk of each town in which the marriage intention was recorded, and of the town where the marriage was solemnized, in conformity with the requirements of §18 [see 3b] (ch. 64, §20), and the clerk of the records of the meeting of Friends shall do likewise (ch. 64, §11). A marriage occurring in an unincorporated place shall be reported to the town clerk of the nearest town (ch. 64, §27). Within seven days after return to this

state, residents marrying elsewhere must file a certificate of their marriage with the clerk of the town in which each of them lived (ch. 64, §8). *Penalties.* Any person wilfully failing to perform a duty imposed shall be fined not exceeding $100 for each offense (ch. 64, §39). A resident failing to report his out-of-state marriage forfeits $20 (ch. 64, §8).

b. Local Record.—The town clerk shall keep a record of each marriage reported or known to him (ch. 64, §33), which shall state its date and place; the name, residence, and official character of the officiant; the name, age, color, birthplace, occupation, residence, and domestic condition of each party; whether first, second or other marriage; and the names, residence, color, occupation, and birthplace of their parents (ch. 64, §18). The town clerk shall enforce the provisions as to marriage returns (ch. 64, §40). *Penalty.* See ch. 64, §39, under 3a. [Note: If a marriage record is incorrect or incomplete the town clerk may receive affidavits as to changes (ch. 64, §38).]

c. State Record.—The town clerk shall transmit every month to the State Registrar of Vital Statistics a copy of all marriage records, or if no marriages, a statement to that effect (ch. 64, §33), and the state registrar shall arrange the returns alphabetically (ch. 64, §35). *Penalty.* A town clerk failing to return a copy as required shall forfeit from $20 to $100 to the use of the state (ch. 64, §33).

d. Evidence.—The town clerk's record—or a copy of a duly kept record attested by a justice of the peace, minister, or clerk (ch. 64, §15)—is prima facie evidence in any judicial proceeding (ch. 64, §37), and a copy of the record of a marriage, certified by the clerk, shall be received in all courts as evidence of the fact of marriage (ch. 64, §12). *Where the identity of the parties is proved, a marriage may be established by a copy of the marriage record (15, 16, 17). Town records of marriage in this state are admissible though produced by an acting deputy town clerk (18), but records of other states are not admissible without the required authentication and proof of the law requiring a record to be kept (19). A certificate of marriage may be shown in evidence (20).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (ch. 64, §1). Marriages within the prohibited degrees are absolutely void without legal process (ch. 65, §1). *Penalty.* Persons marrying within the

forbidden degrees are punishable by imprisonment of from one year to ten years (ch. 126, §2).

b. Proper Civil and Racial Status.—No provision. [As to refusal of license to paupers, see ch. 64, §5, under 1k.] *An act of 1786 forbidding the marriage of a white person with a Negro or mulatto made such marriage void (21).*

c. Proper Legal Status.—The marriage of a person having an undivorced spouse living is void (ch. 64, §3), absolutely and without legal process (ch. 65, §1). *Penalty.* A person married and not legally divorced, or a person whose spouse has not been continually absent for seven years and not known to him or her to be living within that time, who marries another, is punishable by imprisonment not exceeding five years or fine not exceeding $500 (ch. 126, §4). *The marriage of a person already married is void (13, 22), and where a former marriage is established and the first spouse was known to the one remarrying to have been living within seven years, the second marriage is invalid unless the death of the first spouse is proved (23). A divorce which destroys a marriage as to one party destroys it as to the other even though a statute may make remarriage bigamous (24). A former statute prohibiting remarriage within two years after divorce applied only to decrees granted in this state (25).*

d. Proper Consent of Parties.—*The fraud allowing of annulment must go to the essence of the marriage contract and either prevent entry into the relation or preclude the performance of the legal and customary duties thereof (26). Fraudulent representation by a woman that a man is the cause of her pregnancy allows of annulment even though the parties had antenuptial intercourse and the man took no steps to ascertain the true situation (8). But false representation of virtuous spinsterhood by a divorced woman is no cause for annulment (26). Penalty.* Taking a woman unlawfully and against her will and compelling her marriage is punishable by imprisonment for any term of years. [Note: Taking a woman with intent to compel her marriage is punishable by imprisonment of from one to ten years (ch. 120, §17), or from two to twenty years (ch. 126, §14).]

5. STATE SUPERVISION

The town clerk transmits each month to the State Registrar of Vital Statistics the names, residences, and official stations of persons who have neglected to make the required returns of marriages (ch. 64, §33). The state registrar may make investigations of

persons believed not to be making records as required (ch. 64, §41). *Penalty.* Any person refusing to permit such examination is punishable by fine of from $5.00 to $20 (ch. 64, §41). The secretary of the State Board of Health (Registrar of Vital Statistics) shall furnish to town clerks, clerks of courts, officiants, and clerks of the Society of Friends a copy of the laws relating to registration of vital statistics and suitable blanks for recording (ch. 64, §18). The Secretary of State supplies forms for the registry of officiants' credentials and issues officiants' licenses (ch. 64, §12).

6. INTERSTATE RELATIONS

A marriage valid where contracted is valid in this state (3, 27 dictum). When residents of this state intending to remain so resident go elsewhere with intent to evade provisions as to consanguinity, mental deficiencies, and polygamy and have their marriage solemnized and then return and reside here, such marriage is void in this state (ch. 64, §10). [See 1h, 4a, 4c.] *The statute of another state prohibiting remarriage after divorce, penal in nature, has no extraterritorial effect (25).*

MAINE CASES

1. Gardiner v. Manchester, 88 M. 249 (1896). **2.** Damon's Case, 6 M. 148 (1829). **3.** Hiram v. Pierce, 45 M. 367 (1858). **4.** Unity v. Belgrade, 76 M. 419 (1884). **5.** Winslow v. Troy, 97 M. 130 (1902). **6.** St. George v. Biddeford, 76 M. 593 (1885). **7.** Atkinson v. Medford, 46 M. 510 (1859). **8.** Jackson v. Ruby, 120 M. 391 (1921). **9.** Opinions of the Justices, 62 M. 596 (1874). **10.** Ligonia v. Buxton, 2 M. 102 (1822). **11.** Pratt v. Pierce, 36 M. 448 (1853). **12.** State v. Hasty, 42 M. 287 (1856). **13.** Cram v. Burnham, 5 M. 213 (1828). **14.** Howland v. Burlington, 53 M. 54 (1865). **15.** Wedgwood's Case, 8 M. 75 (1831). **16.** Snowman v. Mason, 99 M. 490 (1905). **17.** Jowett v. Wallace, 112 M. 389 (1914). **18.** Audibert v. Michaud, 119 M. 295 (1920). **19.** Reed v. Stevens, 120 M. 290 (1921). **20.** Camden v. Belgrade, 78 M. 204 (1886). **21.** Bailey v. Fiske, 34 M. 77 (1852). **22.** Pittston v. Wiscasset, 4 M. 293 (1826). **23.** Harrison v. Lincoln, 48 M. 205 (1859). **24.** State v. Weatherby, 43 M. 258 (1857). **25.** Phillips v. Madrid, 83 M. 205 (1891). **26.** Trask v. Trask, 114 M. 60 (1915). **27.** Harding **v.** Alden, 9 M. 140 (1832).

MARYLAND

REFERENCES: Annotated Code of Public General Laws of Maryland (two volumes), 1924; Acts of Maryland, 1927; Reports through Volume 150.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to articles and sections of the Code and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Maryland section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—No person within this state shall be joined in marriage until a license shall have been obtained or unless the names of the parties intending to marry shall be thrice published in some church in the county where the woman resides on three several Sundays by some minister residing in said county; provided that any person may marry according to the ceremony used by the Quakers (Art. 62, §4, as amended A. 1927, ch. 380). *Penalty.* Any person, other than Quakers, marrying without a license or publication of the banns, shall be fined $100 (Art. 27, §360). *The requirement for license is directory only and want of a license does not make invalid a marriage otherwise validly solemnized (1).*

b. Issuer.—License is obtained from the clerk of the circuit court for the county in which the marriage is to be performed, or if in Baltimore City, from the clerk of the court of common pleas (Art. 62, §4, as amended A. 1927, ch. 380).

c. Compensation of Issuer.—The clerk of the court shall receive $2.00 for every license issued (Art. 62, §10). Emoluments of the clerks of circuit courts in excess of $3,000 a year are paid in to the treasurer, and if under $3,000 the county commissioners may pay the office expenses, provided that the total of fees plus expenses does not exceed $3000 (Art. 17, §13). Clerks of the courts of Baltimore City receive no other compensation than a salary of $3500 a year (Const. Art. 4, §37), paid out of a fund of the fees collected (Art. 17, §14).

d. Personal Appearance by Candidates.—Before issuing any license the clerk shall examine under oath one of the parties, who shall appear personally before the clerk (Art. 62, §5).

e. Advance Notice and Objections.—No provision as to advance notice. [See Art. 62, §8, under 1k.]

f. Minimum Age.—No statutory provision. [As to common law ages of consent, see Introduction, page 9.]

g. Parental Consent.—No license shall issue unless the male be above twenty-one and the female above eighteen years, or unless the parents or guardian assent thereto, in person or in writing attested by two witnesses (Art. 62, §7). [As to penalty on officiant, see Art. 27, §363, under 2g.]

h. Mental and Physical Qualifications.—[No statutory provision as condition to license issuance.] *For a marriage to be valid there must be an understanding of what the ceremony is and what are the legal consequences deducible therefrom* (*2*). Absolute divorce may be granted when the woman before marriage has been guilty of illicit carnal intercourse with another man, unknown to the husband at the time of marriage (Art. 16, §38).

i. Form of License.—The license, addressed to any officiant, sets forth the names, addresses, age, color, domestic status, and relationship, if any, of the parties (Art. 62, §4, as amended A. 1927, ch. 380).

j. Record of License.—The clerk shall keep a properly indexed record of the issuing of marriage licenses (Art. 62, §6), and the fact of parental consent shall be a part of the record (Art. 62, §7).

k. Other Provisions.—The clerk shall ascertain under oath from the party applying the names, residence, age, color, domestic status, and relationship, if any, of the parties, and if ever divorced; which facts shall be set out and signed by the applicant (Art. 62, §5). *A person taking falsely an oath required by statute as to material facts is guilty of perjury* (*3*). *Penalty.* Perjury is punishable by imprisonment not exceeding ten years (Art. 27, §452). If it appears that any legal impediment to the marriage exists, the clerk shall withhold the license unless ordered by the court of which he is clerk to issue it (Art. 62, §8).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by any minister of the gospel or official of a religious order or body authorized by the rules thereof to join persons in marriage, or according to Quaker ceremony (Art. 62, §4, as amended A. 1927, ch. 380). *The only legal mode of contracting marriage in Maryland is by religious celebration (4, 5). Adding the word "clerk" to a name in an indictment does not show that the person was a minister authorized to solemnize marriage (6).*

b. Officiant's Credentials.—No provision.

c. Presentation of License.—The license authorizes the ceremony by a proper officiant (Art. 62, §11). *Penalty.* An officiant marrying persons without license or publication of banns shall be fined $100 (Art. 27, §362), or from $100 to $500 (Art. 62, §11).

d. Form of Ceremony.—The officiant is authorized to join the parties in matrimony according to the rules of his church or sect and the laws of this state. Persons marrying according to the Quaker ceremony sign a certificate, which must be attested by at least twelve witnesses, to the effect that they have agreed to take each other for husband and wife (Art. 62, §4, as amended A. 1927, ch. 380). *The law does not prescribe what shall be the form of the religious ceremony required (1).*

e. Common Law Marriage.—No statutory provision. *A marriage contracted* per verba de praesenti *has no validity in Maryland (7, 8 dictum), and the law requires a religious ceremony superadded to the civil contract (1, 5, 9). But the validity of a marriage contracted in another state is recognized here though not attended with the same formalities as are required for the celebration of a valid marriage in this state (10, 11, 12). [The case of Chesaldine's Lessee v. Brewer, 1 H. and McH. 152 (1739) concerns proof of a marriage in fact and not, as often cited, the creation of a common law marriage.—G.M.]*

f. Irregular Solemnization.—*Where the law requires for the validity of marriage ministration by a person in holy orders and the parties acting bona fide are imposed upon by one assuming that character and are deceived, the law will nevertheless decree in favor of the marriage (5). Penalty.* A person celebrating marriage when not authorized by law shall be fined $500 (ch. 27, §359).

g. Other Provisions.—*Penalties.* Any minister knowingly celebrating marriage between persons within the prohibited degrees of

consanguinity and affinity shall pay $500 (Art. 27, §357). Any officiant marrying a Negro with a white person shall be fined $100 (Art. 27, §358). Any minister knowingly joining in marriage any male under twenty-one or any female under sixteen years without the consent of the parent or guardian, personally given or signified under seal and attested by two witnesses, shall be fined $1500 (Art. 27, §363). Any officiant giving a person any reward directly or indirectly as an inducement to bring to him any person contemplating matrimony shall be fined from $10 to $50 for each offense (Art. 27, §364).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—One of the certificates signed by the officiant, showing his official position, shall be handed to the parties, and the other within thirty days shall be returned to the clerk of the court from which the license issued (Art. 62, §4, as amended A. 1927, ch. 380), or in the case of banns, to the clerk of the circuit court for the county where the marriage was celebrated or to the clerk of the court of common pleas if in Baltimore City (Art. 62, §12). The certificate of a marriage between Quakers shall be recorded within sixty days either among the records of the society to which either person may belong or in some court of record in the city or county in which the marriage was accomplished (Art. 62, §4, as amended A. 1927, ch. 380). *Penalties.* An officiant failing to return the certificate within thirty days (Art. 62, §11), or within sixty days in case of publication of banns, shall be fined not less than $10 (Art. 62, §13).

b. Local Record.—The clerk shall record the certificate, the time of filing, and the name of the officiant (Art. 62, §§6 and 12). The clerks of courts having charge of issuing licenses shall record in a separate book certificates of all marriages contracted in some other state when one or both of the parties shall have been citizens of this state (Art. 62, §17).

c. State Record.—The clerk of the court shall transmit monthly to the Bureau of Vital Statistics of the State Department of Health a report of every marriage reported to him (Art. 62, §16). *Penalty.* Any clerk failing to transmit the report shall be fined $10 for each offense (Art. 62, §16).

d. Evidence.—A certified copy of the marriage license and certificate is prima facie evidence of the marriage (Art. 62, §9), as is a certified copy of a recorded certificate of marriage celebrated after

publication of banns (Art. 62, §12), or a copy of a foreign record legally required and kept, when under the hand and seal of the keeper (Art. 35, §45). *A record book of a county court containing the officiant's certificate of marriage and an entry from the parish register is admissible (13). Absence of an official record of a license and certificate in the place of the alleged marriage is not evidence against the marriage in states where common law marriages may be contracted (14). A private memorandum in a minister's record of marriage is admissible to show whether he solemnized a particular marriage, subject to contrary evidence (15), and a marriage certificate is proof of marriage but only upon evidence of the parties' identity (16).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (Art. 62, §2). A marriage within the prohibited degrees shall be void (Art. 62, §1) and may be so declared by the proper court (Art. 62, §14). *A marriage within the forbidden degrees is not void ab initio and subject to collateral attack but must be declared void by a competent court during the lives of the parties (17, 18). Penalties.* Any person marrying within the three degrees of direct lineal consanguinity, or within the first degree of collateral consanguinity, shall forfeit $1500, or be banished the state forever (Art. 27, §355), and any person marrying within the other prohibited degrees shall forfeit $500 (Art. 27, §356).

b. Proper Civil and Racial Status.—Marriages between white persons and persons of Negro descent to the third generation inclusive are prohibited and void (Art. 27, §365). *Penalty.* Violation is punishable by imprisonment of from eighteen months to ten years (Art. 27, §365).

c. Proper Legal Status.—On petition the proper court may declare a second marriage, the first subsisting, null and void (ch. 62, §14). *Though the marriage of a person already married is absolutely void (4), a declaration of nullity will be granted only upon clear evidence that the former marriage was actually subsisting at the time of the later marriage (19) and only upon action of a party to the later marriage, not of a third person (20).* A married person marrying another shall be imprisoned for from eighteen months to nine years, unless the former spouse has continuously remained beyond the seas for seven years or has been absent seven years together, the one not knowing the other to be living within that time (Art. 27, §23). *The exceptions to the bigamy statute are matters of defense and non-existence thereof need not be*

alleged in the indictment (21). A woman abandoned by her husband may not marry again until he has been absent for seven years (22). A former statute allowing the court to prohibit the guilty party to a divorce to marry again affected all divorce decrees granted after its enactment (23), but such decree being a judgment in personam could not affect a party defendant who was a non-resident not voluntarily appearing in the action(24). There is a presumption in favor of the legality of a marriage formally contracted (10, 25).

d. Proper Consent of Parties.—*A statement by one party at the time of marriage that he will never live with the other does not render the ceremony void (26) especially if there was in fact later cohabitation (27). A marriage may be annulled for fraud going to the essence of the contract (28, 29). Such fraud does not include a misrepresentation that a former spouse had died when in fact he was divorced, regardless of the innocent party's religious belief opposed to marrying divorced persons (29). But if a fraud induces a person of youth or immature mind to contract a marriage which no reasonable person would contract with knowledge and which would affect such person's health or well-being, the marriage may be annulled in an action promptly brought before intervention of the rights of third persons (28, 30). Annulment may be granted when induced by such duress as would overcome the judgment and coerce the will, but courts are exacting in cases of antenuptial incontinence between the parties, not wishing a man to escape criminal punishment and then evade marital obligations by annulment (26, 31). Penalty.* Taking or detaining a female unlawfully against her will with intent to compel her marriage is punishable by imprisonment of from two to twelve years and fine not exceeding $5000 (Art. 27, §424). *A voidable marriage may be ratified by cohabitation after removal of the condition which made it voidable (31).*

5. STATE SUPERVISION

The State Comptroller furnishes marriage license blanks in the form prescribed by statute (Art. 19, §25). The State Registrar of Vital Statistics, under the direction of the State Board of Health (of which he is secretary), shall prepare necessary methods, books, and forms for registration and supply them to local registrars, officiants, and other persons (Art. 43, §16; Art. 62, §16). [Blanks supplied by the state registrar included originally only those used in the registration of births and deaths. Since the duty to register marriages has been imposed upon him and codified under the chapter on Marriages, quaere whether he now exercises as to marriages the

same duties concerning forms as are provided concerning births and deaths under the chapter on Health, subheading on State Registrar of Vital Statistics.—G.M.]

6. INTERSTATE RELATIONS

No statutory provision. [The penalty for marrying outside the state without license was repealed by A. 1927, ch. 565.—G.M.] *A marriage valid where contracted is valid in this state (10, 32) even though not contracted according to the forms prescribed in this state (10). The marriage of an uncle and a niece, validly contracted elsewhere, not being antichristian and not being denied all validity by the laws of Maryland, will be recognized here (32). A statute of New York prohibiting remarriage after divorce has no extraterritorial effect and does not itself render void a marriage otherwise validly contracted in another state (33).*

MARYLAND CASES

1. Feehley v. Feehley, 129 M. 565 (1916). **2.** Montgomery v. U'Nertle, 143 M. 200 (1923). **3.** State v. Floto, 81 M. 600 (1895). **4.** Fornshill v. Murray, 1 Bland 479 (1828). **5.** Knapp v. Knapp, 149 M. 263 (1925). **6.** U.S. v. McCormick, 1 Cranch C.C. 593 (1810); also Fed. Cas. No. 15, 663. **7.** Denison v. Denison, 35 M. 361 (1871). **8.** Diggs v. Wormley, 21 D.C. 477 (1893). **9.** Scott v. Independent Ice Co., 135 M. 343 (1919). **10.** Redgrave v. Redgrave, 38 M. 93 (1873). **11.** Hanon v. State, 63 M. 123 (1885). **12.** Jackson v. Jackson, 80 M. 176 (1894) and 82 M. 17 (1895). **13.** Shorter v. Boswell, 2 H. and J. 359 (1808). **14.** Pontier v. State, 107 M. 384 (1908). **15.** Blackburn v. Crawfords, 3 Wall. (U.S.) 175 (1865).

16. Bowman v. Little, 101 M. 273 (1905). **17.** Harrison v. State, 22 M. 468 (1864). **18.** Tyler v. Andrews, 40 App. D.C. 100 (1913). **19.** Le Brun v. Le Brun, 55 M. 496 (1880). **20.** Ridgely v. Ridgely, 79 M. 298 (1894). **21.** Barber v. State, 50 M. 161 (1878). **22.** Rhea v. Rhenner, 1 Pet. (U.S.) 105 (1828). **23.** Elliott v. Elliott, 38 M. 357 (1873). **24.** Garner v. Garner, 56 M. 127 (1880). **25.** Schaffer v. Richardson, 125 M. 88 (1915). **26.** Wimbrough v. Wimbrough, 125 M. 619 (1915). **27.** Brooke v. Brooke, 60 M. 524 (1883). **28.** Brown v. Scott, 140 M. 258 (1922). **29.** Oswald v. Oswald, 146 M. 313 (1924). **30.** Corder v. Corder, 141 M. 114 (1922). **31.** Owings v. Owings, 141 M. 416 (1922). **32.** Fensterwald v. Burk, 129 M. 131 (1916). **33.** Dimpfel v. Wilson, 107 M. 329 (1908).

MASSACHUSETTS

REFERENCES: General Laws of Massachusetts (two volumes and index), 1921; Acts and Resolves of Massachusetts, 1921, 1922, 1923, 1924, 1925, 1926 (or as compiled in Massachusetts Cumulative Statutes, 1927), 1927; Reports through Volume 255.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to chapters and sections of the General Laws and session laws amending them, the amended and added provisions being available also in the Cumulative Statutes. Numbers that ollow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Massachusetts section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Persons intending to be joined in marriage in the commonwealth shall cause notice of their intention to be filed (ch. 207, §19); and a certificate of intention shall be delivered to the officiant (ch. 207, §28). [The license in Massachusetts is designated as certificate of intention.—G.M.]

b. Issuer.—Notices of intention are filed in the office of the clerk or registrar of the town where each of the parties resides, or if nonresidents of the commonwealth, of the town where the marriage is to be solemnized (ch. 207, §19). [Note: City clerks have the powers and are subject to the liabilities of town clerks (ch. 41, §3).]

c. Compensation of Issuer.—For entering notice of an intention of marriage and issuing the certificate thereof, town clerks shall receive a fee of $1.00, paid at the time of such entry (ch. 262, §34). The compensation of elected officers of a town (including the clerk) shall be fixed by vote of the town, and a city by ordinance may prescribe that all fees be turned into the city treasury, paying the officer such compensation as the city council may determine (ch. 41, §108).

d. Personal Appearance by Candidates.—The clerk or registrar shall require written notice of intention of marriage by one of the parties, or his parent or guardian, the person giving such notice to

make oath before him (ch. 207, §20). *Penalty.* Violation of any provision of §20, and false swearing in making any statement required thereunder, shall be punished by fine or imprisonment at the discretion of the court (ch. 207, §52).

e. Advance Notice and Objections.—Persons intending to be married shall cause notice of intention to be filed not less than five days before their marriage (ch. 207, §19), and the clerk or registrar shall not issue a certificate of intention before such time, except as provided (ch. 207, §33, as amended A. 1923, ch. 305). *The five days' period excludes the day of filing notice and any Sunday or holiday when the clerk's office is not open (1).* If either party has arrived as an immigrant from a foreign country within five days, notice of intention may be filed at any time before the marriage and the certificate of intention issued at any time after the filing thereof (ch. 207, §29). Upon application of both parties, where both are residents of the commonwealth or both are non-residents, or upon application of the one party residing within the commonwealth, a judge of probate or a justice of a district court, after hearing, may grant a certificate authorizing immediate solemnization of the marriage, upon presentation of which—or, in emergency cases when the death of either party is imminent, upon the authoritative request of a minister or attending physician—the clerk or registrar shall issue the certificate of intention at once (ch. 207, §30). *Penalty.* A clerk or registrar issuing a certificate of intention contrary to §33 shall forfeit not more than $100 (ch. 207, §53).

f. Minimum Age.—The clerk or registrar shall not receive a notice of intention of marriage of a male under eighteen or a female under sixteen years (ch. 207, §24), except that the probate court of the county, or the district court of the judicial district within which such minor resides, after hearing, may make an order allowing the marriage if the parents, surviving parent, or guardian shall have consented, or allowing the marriage of a person whose age is alleged to exceed that specified but who can produce no official birth record, and the clerk or registrar, upon receiving a certified copy of such order, shall issue a certificate of intention as in other cases (ch. 207, §25, as amended A. 1922, ch. 98, and A. 1923, ch. 305). A marriage solemnized when either party is under fourteen, if a male, or twelve, if a female, shall be void without legal process if the parties separate during such nonage and do not afterward cohabit (ch. 207, §9). *The marriage of a girl of twelve years, being valid according to the common law and not declared void by statute, is binding (2).*

g. Parental Consent.—The clerk or registrar shall not issue the certificate of intention when he has reasonable cause to believe the male under twenty-one or the female under eighteen years, except upon the written consent of the parent or guardian of such person—if there be one in this commonwealth competent to act—or by order of the probate or district court as provided in §25 (ch. 207, §33, as amended A. 1923, ch. 305). [See 1f.] The consent of a parent by adoption to the marriage of a minor shall be sufficient, and if the natural parents have been divorced, the consent of the parent having the custody of a minor shall be sufficient (ch. 207, §27). *Penalty.* A clerk or registrar issuing a certificate of intention contrary to §33 shall forfeit not more than $100 (ch. 207, §53). [As to solemnization without parental consent, see ch. 207, §§7 and 51, under 2g.] [Note: Whoever fraudulently entices away an unmarried female under sixteen years without the consent of her parent or guardian, for the purpose of effecting a clandestine marriage without such consent, shall be imprisoned for not more than one year, fined not more than $1000, or both (ch. 272, §1).] If it is necessary to give notice in two towns of the intention of marriage of a minor, the clerk or registrar who first takes the consent of the parent shall take it in duplicate, retaining one copy and delivering the other to the person obtaining the certificate, to be given to the clerk or registrar issuing the said certificate (ch. 207, §34). *Penalty.* Violations of §34 shall be punished by a fine of not more than $500, imprisonment for not more than one year or both (ch. 207, §51). *The marriage of a minor solemnized in this state without parental consent is valid (3, 4).*

h. Mental and Physical Qualifications.—[No specific statutory provision as condition to license issuance. But see ch. 207, §20, under 1k.] Insane persons or idiots are incapable of contracting marriage, and a contest of the validity of the marriage of such person shall be raised only in a process instituted for that purpose in the lifetime of both parties (ch. 207, §5). *Though the marriage of a person at the time* non compos mentis *is void (5), a person's ability to go through the marriage ceremony with propriety is prima facie evidence of sufficient understanding to make the contract, and mere dejection and singularities of conduct do not adequately prove insanity (6). The statute declaring the validity of such a marriage questionable only directly and not collaterally is constitutional (7). Though epilepsy is no ground for annulment (8), a marriage may be avoided for the affliction of one party, unbeknown to the other, with practically incurable syphilis (9), at least if the marriage is unconsummated and the disease is transmissible as*

well as contagious (9, 10). Annulment may be granted for concealed antenuptial pregnancy (11, 12, 13, 14, 15) if not for mere unchastity (11, 16). [*See* 4d.]

i. **Form of License.**—The certificate of intention shall specify the date when notice of intention was filed and all facts relative to the marriage which are required by law to be ascertained and recorded, except those known only after solemnization (ch. 207, §28). [See ch. 46, §1, under 3b.] The clerk or registrar may dispense with the statement of any facts required to be given in the notice of intention if they do not affect the age, identity, or former marriage of either party and cannot be obtained with reasonable effort (ch. 207, §35).

j. **Record of License.**—No provision.

k. **Other Provisions.**—The person giving notice of intention shall make oath that all statements therein of which he could have knowledge are true and that there are no legal impediments to the marriage (ch. 207, §20). *Penalty.* See ch. 207, §52, under 1d. The clerk or registrar may refuse to issue a certificate of intention if he has reasonable cause to believe any of the statements in the notice of intention incorrect; but in his discretion he may accept depositions under oath, made before him, which shall be sufficient proof to authorize issuance of the certificate of intention (ch. 207, §35). The clerk or registrar of every town shall post in his office the printed list of all legal impediments to marriage, furnished him by the state secretary (ch. 207, §37). *Penalty.* Violation of §37 is punishable by fine or imprisonment at the discretion of the court (ch. 207, §52). The clerk or registrar need not receive notices of intention on Sunday or a legal holiday, or at any place except his office (ch. 207, §23).

Where one or both of the persons filing notice of intention shall have been previously married and divorced, they shall file therewith a certificate from the clerk of the court by which the divorce was granted showing the names of the parties, cause for divorce, date when decree became absolute, and court granting it (ch. 207, §21). If a person cannot obtain such certificate, he shall apply to the judge of probate in the county where notice of intention is to be filed, who, if satisfied of the truth of the statements, shall grant the party a certificate stating the facts required (ch. 207, §22). The clerk or registrar shall not issue a certificate of intention to parties previously married and divorced, unless the certificate described in §21 or §22 is filed with the notice of intention, to which he shall attach such certificate (ch. 207, §32).

Whoever, without the consent of both parties, gives the notice of their intention of marriage, shall be liable in damages to either party (ch. 207, §26). *Penalty.* Violations of any provision of §26 shall be punished by a fine of not more than $500, imprisonment for not more than one year, or both (ch. 207, §51).

If the certificate is not used, it shall be returned to the office issuing it within six months (ch. 207, §28). *Penalty.* Whoever having taken out a certificate of intention and not having used it, fails to return it within six months, shall be fined not more than $10 (ch. 207, §57). [As to penalty for issuing a certificate of intention to residents of another jurisdiction when the marriage would be void by the law of such jurisdiction, see ch. 207, §50, under 6.]

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by an ordained minister residing in the commonwealth and continuing to perform the functions of his office, in any place within the commonwealth; by a Jewish rabbi duly licensed by a congregation in the commonwealth; by a justice of the peace, if he is also clerk or assistant clerk of a town, or a registrar or assistant registrar, in the town where he holds such office, or if also a clerk or assistant clerk of a court, in the city or town in which such court is held, or, if he has been designated as provided in the following section, in the town where he resides; and among Quakers according to their usage (ch. 207, §38). The Governor in his discretion may designate a justice or justices of the peace in each town, not exceeding one for every 5000 inhabitants, to solemnize marriage, subject to revocation of such designation for cause, and the state secretary, upon payment of $5.00 by such justice, shall issue to him a certificate of designation. The Governor may also designate a minister or rabbi residing out of the commonwealth to solemnize a specified marriage, which may be solemnized in any place within the commonwealth after the state secretary has issued to such minister or rabbi a certificate of designation (ch. 207, §39, as amended A. 1926, ch. 102). *For a marriage to be lawful the officiant must act in his official capacity and not as a mere witness (17, 18). Former statutes required a minister to be "stated and ordained" (19) and the solemnization to be in the town of his residence or among members of his parish (20).*

b. Officiant's Credentials.—[No general provision.] A rabbi may not solemnize marriages until he has filed with the clerk or registrar of the town where he resides a certificate of the establishment of the synagogue, the date of his appointment thereto, and the term of his engagement (ch. 207, §38).

c. Presentation of License.—The certificate of intention shall be delivered to the officiant before he solemnizes the marriage (ch. 207, §28). *Penalty.* An authorized officiant joining in marriage persons who have not complied with the laws as to procuring certificates of intention shall be fined not more than $500 (ch. 207, §49).

d. Form of Ceremony.—[No general statutory provision.] Marriage may be solemnized among Quakers according to their usage (ch. 207, §38). *Though no form of words is established for solemnization, there must be a mutual engagement, except in the case of Quakers, in the presence of an authorized officiant (18, 21) who considers his act as a solemnization of marriage (22).*

e. Common Law Marriage.—[No general statutory provision.] *There can be no valid marriage contracted in Massachusetts, except among Quakers, without a solemnization by an authorized officiant (18, 21, 23).*

If a person, during the lifetime of a spouse, contracts a subsequent marriage with due legal ceremony, and such marriage was entered into by one of the parties in good faith, if the parties continue to cohabit as husband and wife, in good faith on the part of one of them, after the impediment has been removed by the death or divorce of the other party to the former marriage, they shall be held to have been legally married from and after the removal of such impediment (ch. 207, §6). *The statute is constitutional (24). If all the conditions of the statute are fulfilled, it applies to validate a marriage after removal of an impediment as by a decree of divorce becoming absolute (25), two years elapsing after the decree (26, 27)* [see ch. 208, §24, under 4c], *or a presumption of death arising (28). But though good faith does not demand prudence (25), the statute does not apply where the one party knew of the other's divorce from a former marriage within two years (29). The remedy provided must take effect instantly and has no extraterritorial effect to validate the marriage of parties living in another state at the time of removal of the impediment (30). The purpose of the statute being to cure fraud existing at the time of the solemnization, there can be no fraud allowing of annulment in absence of a false representation affecting capacity at the time of removal of the impediment (31).*

f. Irregular Solemnization.—The validity of a marriage solemnized before a person professing to be an authorized officiant shall not be affected by any want of authority in such person, or by an omission or informality in filing the notice of intention, if the marriage is otherwise lawful and is consummated with the full belief of

either party that they have been lawfully married (ch. 207, §42). *Penalty.* An unauthorized person undertaking to join others in marriage shall be fined not more than $500, imprisoned not more than one year, or both (ch. 207, §48).

g. Other Provisions.—No person shall solemnize marriage in the commonwealth unless he can read and write English (ch. 207, §38). An officiant shall not solemnize a marriage if he has reasonable cause to believe the male under twenty-one or the female under eighteen years, except with the consent of the parent or guardian, if there is any such in the commonwealth competent to act (ch. 207, §7). *Penalties.* Violations of §7 shall be punished by a fine of not more than $500, imprisonment for not more than one year, or both (ch. 207, §51). *This penalty on the officiant does not invalidate the marriage of a girl of twelve years* (*2*). Whoever performs a marriage ceremony upon a certificate of intention more than six months after its issue shall be fined not more than $10 (ch. 207, §57). Advertising to perform or to procure the performance of the marriage ceremony is punishable by fine of from $10 to $100 (ch. 207, §58). [As to penalty for solemnizing a marriage between residents of another jurisdiction which would be void by the law of such jurisdiction, see ch. 207, §50, under 6.] [Note: The fee for solemnizing and certifying a marriage shall be $1.25 (ch. 262, §35). *Though a person corruptly demanding more than the statutory fee for performing an official duty is subject to penalty, a justice demanding $5.00 for solemnizing a marriage is not liable if he did not act corruptly and if he went out of his way and delivered a certificate not required by law* (*32*).]

3. THE MARRIAGE RECORD

a. Marriage Certificates.— Every officiant and witnessing clerk[1] shall keep a record of each marriage solemnized by him, or solemnized in his presence, and of all facts required by §1 of ch. 46 [see 3b], returning each certificate of intention to the issuer by the tenth of the month following the marriage, and if the marriage was solemnized in a town other than that where the parties resided, returning a copy to the clerk or registrar of the town where the marriage was solemnized, each of which certificates and copy shall contain a statement giving the place and date of marriage, attested by the signature of the officiant or witnessing clerk, and his title and residence (ch. 207, §40). If a certificate of intention is found, upon its return, to have been incorrectly filled out by the officiant, the clerk shall have it

[1] See Introduction, p. 24.

corrected and shall impose the penalties provided by law (ch. 207, §41). *Penalties.* Whoever neglects to make the record and returns required by §40 shall forfeit from $20 to $100 (ch. 207, §56). Whoever makes a false return of a marriage shall forfeit not more than $50 (ch. 46, §14). [Note: A city or town may authorize its clerk or registrar to pay 25 cents to any officiant after receipt from him of a marriage certificate in legal form (ch. 207, §44).]

b. Local Record.—All certificates of intention or copies returned shall be recorded by the clerk or registrar receiving them (ch. 207, §40), indexed and conveniently arranged (ch. 46, §2). Every town clerk shall receive and record the following facts relative to marriages in his town: date of record; date and place of marriage; name, residence, and official status of the officiant; name, birthplace, residence, age, color, domestic status, and occupation of each party; full names of their parents; number of the marriage (ch. 46, §1). *Penalties.* See ch. 207, §56, and ch. 46, §27, under 3a; 3c. [Note: No alteration shall be made by any person on the certificate of intention until it has been returned to the clerk or registrar (ch. 207, §31). Upon proper information the clerk may correct errors and omissions in the record (ch. 46, §13, as amended A. 1925, ch. 281, §2). City councils and selectmen may cause copies to be made of the marriage records kept by a church or parish in their town (ch. 66, §5).] If residents of this commonwealth who have been married in another state return to reside here, within seven days after their return they shall file with the clerk or registrar where either of them lived at the time of their marriage a certificate thereof, including the facts required in a notice of intention (ch. 207, §36). *Penalty.* Whoever violates §36 shall forfeit $10 (ch. 207, §55). *A conspiracy to record a marriage not in fact existent is indictable as a wrong impairing the value of a public record, necessary to the security of the marriage relation* (*33*).

c. State Record.—The clerk of each town and city shall transmit annually to the state secretary certified copies of the records of marriages recorded therein (ch. 46, §17). The state secretary shall cause the copies received by him to be bound, with indices (ch. 46, §21). *Penalty.* A clerk or registrar neglecting to perform any duty required under this chapter shall be fined from $20 to $100 (ch. 46, §27). [As to appointment and powers of State Registrar of Vital Statistics, see ch. 9, §10, under 5.]

d. Evidence.—The record of a marriage made by the officiant or by the clerk or registrar, or a duly certified copy thereof, shall be

prima facie evidence of such marriage (ch. 207, §45). *The record of marriage is presumptive evidence of the fact (34) even though signed by the assistant registrar, if he was authorized by ordinance to act (35). If the clerk's record is by statute evidence of "the facts recorded," it is admissible to prove a person's residence (36). Foreign marriage records are not admissible without proof of legal obligation or established practice requiring the keeping of such records (37). A certificate of marriage may not be admissible unless signed by the officiant in his official capacity (17) and proved by his testimony on oath (38, 39). The certificate of a minister in another state, wholly unauthenticated, is not evidence (40), though in colonial times authentication was not necessary (41).* Marriage may be proved by admission of an adverse party or by evidence of general repute or cohabitation or of any other fact from which it may be inferred (ch. 207, §47).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Such marriages are prohibited (ch. 207, §§1, 2), and if solemnized within the commonwealth shall be void without legal process (ch. 207, §8). The prohibitions of §§1 and 2 shall continue notwithstanding the dissolution, by death or divorce, of the marriage creating the affinity, unless the divorce was granted because such marriage was originally unlawful or void (ch. 207, §3). *Penalty.* Persons intermarrying within the prohibited degrees of consanguinity shall be imprisoned in the state prison for not more than twenty years or in jail for not more than two and one-half years (ch. 272, §17). [Marriages prohibited on account of affinity being void, cohabitation thereunder would be lewd and lascivious cohabitation, punishable by imprisonment in the state prison for not more than three years or in jail for not more than two years or by a fine of not more than $300 (ch. 272, §16).—G.M.] *Though the marriage of an uncle and niece (42) or half-niece (43), or of an aunt and nephew, is null and void if solemnized in this state, it is not incestuous by the general law of Christianity (44). Relatives of the half blood are considered the same as those of the whole blood (43).*

b. Proper Civil and Racial Status.—No provision. *A former statute made void the intermarriage of a white person and a Negro or mulatto (45, 46).*

c. Proper Legal Status.—A marriage solemnized within the commonwealth which is prohibited by reason of either party having a

former spouse living shall be void (ch. 207, §4) without legal process (ch. 207, §8). *The marriage of a person already married is void (47, 48) and this notwithstanding that the later marriage is not bigamous because of the absence of the prior spouse (49). Independent of a statute no court of chancery has authority to annul a marriage because of a prior existing marriage (50).* Whoever, having a former spouse living, marries another, shall be imprisoned in the state prison for not more than five years or in jail for not more than two and one-half years or fined not more than $500, unless the former spouse has remained beyond the sea or has voluntarily withdrawn and remained absent for seven consecutive years, not known to such person to be living within that time, or unless such person has been legally divorced and was not the guilty cause of such divorce, or has been legally divorced and two years have elapsed from the entry of the absolute decree (ch. 272, §15). *The statute excepts from the pains of bigamy only one who has been deserted by a spouse, not one deserting, for a period of seven years (51). Thus a man marrying in good faith and cohabiting with a woman whose husband has deserted her and remained absent for seven years without being heard from and believed dead is not guilty of adultery though the husband be in fact alive (52), but if the woman herself left her husband and remarried after seven years, the second man is guilty (53), because with removal of one spouse from the matrimonial domicil no presumption of the death of the other arises (53, 54). Mere honest belief in an absent spouse's death is no defense unless confirmed by an absence of seven years with ignorance of the absentee's continued existence (55).*

A divorce decree shall become absolute after the expiration of six months from the entry thereof (ch. 208, §21), and thereafter either party may remarry, except that the party from whom the divorce was granted shall not remarry within two years (ch. 208, §24). *A marriage to another person after a decree nisi for divorce but before the decree absolute is void (30, 56, 57) and itself prevents the decree from becoming absolute (57), except where the parties reasonably believed the absolute decree to have been entered when in fact an accident had intervened (58). The marriage of the guilty party to a divorce within the forbidden period after the absolute decree, the former spouse being alive, is void (59, 60) and was so under earlier statutes (61, 62, 63, 64). But the statute prohibiting the remarriage of the guilty party, being penal, applies only to divorces granted in Massachusetts (65, 66) and only to marriages contracted in Massachusetts (67, 68), not extending to marriages validly contracted elsewhere (67, 69) unless the party is domiciled in Massachusetts (70)* [*see* 6]. *The prohibition of remarriage applies*

only to a marriage with a third person and not to a remarriage of the parties (71). When a marriage de facto is proved it is presumed to be according to law (72).

d. Proper Consent of Parties.—No statutory provision. *The validity of a marriage properly contracted is not affected by any collateral agreement of the parties, such as not to live together: the status is fixed when the contract is properly solemnized (73) and consummation is unnecessary (73, 74). But an agreement merely to enter a copartnership on the basis of marriage to continue as long as mutual affection shall exist, and cohabitation thereunder, is nowhere a valid marriage (75).*

Inasmuch as the fraud necessary for annulment must go to the essence of the marriage relation (8, 11, 76, 77), a marriage may not be annulled for misrepresentations as to previous chastity (11, 76), as to a prior marriage since dissolved (76), or as to name, residence, and financial standing (77), for concealment of epilepsy (8), or for a dominant desire for mercenary advantage (78). But procreation being an important object of matrimony, a marriage may be annulled for the following causes; intent to refuse to cohabit and immediately to desert (79), provided that the refusal of intercourse was intended previous to the marriage (80); concealment of incurable syphilis (9, 10), if the disease is in a transmissible stage and the marriage not consummated (10); mere concealment of antenuptial pregnancy (11, 12), or misrepresentations concerning pregnancy, unless the man had also had premarital relations with the woman, in which case he is put on his guard as to such a possibility (13, 14, 15) even though he is immature (15). Fraud existing at the time of marriage may be cured by the remedial statute if the parties cohabit after removal of the impediment (31). [See 2e.] *A marriage may not be annulled for duress if a man, under legal arrest for bastardy, marries the woman instead of contesting the charge (81).*

5. STATE SUPERVISION

The state secretary shall furnish a printed list of all legal impediments to marriage to the clerk or registrar of every town (ch. 207, §37). *Penalty.* See ch. 207, §52, under 1k. The state secretary shall provide town and city clerks with blanks for the transmission to him of copies of marriage records (ch. 46, §17). The state secretary may appoint a state registrar of vital statistics who may enforce all laws relative to the registry of marriages with authority to prosecute violations (ch. 9, §10, as amended A. 1922, ch. 375).

6. INTERSTATE RELATIONS

If a resident of this commonwealth, intending to continue so resident, contracts in another jurisdiction a marriage prohibited and declared void by the laws of this commonwealth, such marriage shall be null and void here (ch. 207, §10). No marriage shall be contracted in this commonwealth by a resident of another jurisdiction, intending to continue so resident, if such marriage would be void if contracted in such jurisdiction, and every marriage contracted in this commonwealth in violation of this provision shall be null and void (ch. 207, §11). *Penalty.* Any official issuing a certificate of intention, or any officiant solemnizing a marriage, knowing that the parties are prohibited by §11 from intermarrying, shall be fined from $100 to $500, imprisoned not more than one year, or both (ch. 207, §50). [Note: Marriages solemnized in a foreign country by a consul or diplomatic agent of the United States shall be valid in this commonwealth (ch. 207, §43).] *Under the general common law rule a marriage valid where contracted is valid everywhere even if contracted elsewhere to evade the laws of the parties' domicil (3, 4, 46, 61, 62, 67, 68, 76, 82 dictum, 83 dictum), and conversely a marriage void where contracted has no legal effect elsewhere (84). Such marriage may not, however, be contrary to the general laws of Christendom (44) or contrary to the public policy of the domicil as declared by its law-making body (3, 59, 70). Under a former statute prohibiting evasive out-of-state marriages nullity depended upon both parties being Massachusetts residents, both intending the evasion, and both returning to reside here (25, 69, 85), but under the present statute nullity is dependent upon only one of the parties going elsewhere to contract an evasive marriage (59).*

7. SEX OFFENSES AND MARRIAGE

In a bastardy proceeding if the court is satisfied that the defendant and the mother have married each other, the case may be dismissed and the adjudication vacated (ch. 273, §17).

MASSACHUSETTS CASES

1. Opinion of Attorney General, 3 O.A.G. 467 (1912). **2.** Parton v. Hervey, 1 Gray 119 (1854). **3.** Comm. v. Graham, 157 M. 73 (1892). **4.** Levy v. Downing, 213 M. 334 (1913). **5.** Middleborough v. Rochester, 12 M. 363 (1815). **6.** Anonymous, 4 Pick. 32 (1826). **7.** Goshen v. Richmond, 4 Allen 458 (1862). **8.** Richardson v. Richardson, 246 M. 353 (1923). **9.** Smith v. Smith, 171 M.

404 (1898). **10.** Vondal v. Vondal, 175 M. 383 (1900). **11.** Reynolds v. Reynolds, 3 Allen 605 (1862). **12.** Donovan v. Donovan, 9 Allen 140 (1864). **13.** Foss v. Foss, 12 Allen 26 (1866). **14.** Crehore v. Crehore, 97 M. 330 (1867). **15.** Safford v. Safford, 224 M. 392 (1916). **16.** Comm. v. Shaman, 223 M. 62 (1916). **17.** Mangue v. Mangue, 1 M. 240 (1804). **18.** Milford v. Worcester, 7 M. 48 (1810). **19.** Comm. v. Spooner, 1 Pick. 235 (1822). **20.** Leavitt v. Truair, 13 Pick. 111 (1832).

21. Comm. v. Munson, 127 M. 459 (1879). **22.** Meyers v. Pope, 110 M. 314 (1872). **23.** Norcross v. Norcross, 155 M. 425 (1892). **24.** Lufkin v. Lufkin, 182 M. 476 (1902–03); motion dismissed, 192 U.S. 601 (1903). **25.** Gardner v. Gardner, 232 M. 253 (1919). **26.** Comm. v. Josselyn, 186 M. 186 (1904). **27.** Tozier v. Haverhill etc. Street Ry., 187 M. 179 (1905). **28.** Turner v. Williams, 202 M. 500 (1909). **29.** Littlefield v. Littlefield, 174 M. 216 (1899). **30.** Comm. v. Stevens, 196 M. 280 (1907). **31.** Turner v. Turner, 189 M. 373 (1905). **32.** Vogel v. Brown, 201 M. 261 (1909). **33.** Comm. v. Waterman, 122 M. 43 (1877). **34.** Comm. v. Dill, 156 M. 226 (1892). **35.** Comm. v. Hayden, 163 M. 453 (1895). **36.** Shutesbury v. Hadley, 133 M. 242 (1882). **37.** Derinza's Case, 229 M. 435 (1918). **38.** Ellis v. Ellis, 11 M. 92 (1814). **39.** Comm. v. Littlejohn and Barbarick, 15 M. 163 (1818). **40.** Comm. v. Morris, 1 Cush. 391 (1848).

41. Rex v. Mangent, Quincy 162 (1765). **42.** Divoll v. Leadbetter, 4 Pick. 220 (1826). **43.** Comm. v. Ashey, 248 M. 259 (1924). **44.** Sutton v. Warren, 10 Metc. 451 (1845). **45.** Medway v. Natick, 7 M. 88 (1810). **46.** Medway v. Needham, 16 M. 157 (1819). **47.** Randlett v. Rice, 141 M. 385 (1886). **48.** Adams v. Adams, 154 M. 290 (1891). **49.** Glass v. Glass, 114 M. 563 (1874). **50.** Kelley v. Kelley, 161 M. 111 (1894). **51.** Comm. v. Johnson, 10 Allen 196 (1865). **52.** Comm. v. Thompson, 6 Allen 591 (1863). **53.** Comm. v. Thompson, 11 Allen 23 (1865). **54.** Hyde Park v. Canton, 130 M. 505 (1881). **55.** Comm. v. Mash, 7 Metc. 472 (1844). **56.** Cook v. Cook, 144 M. 163 (1887). **57.** Moors v. Moors, 121 M. 232 (1876). **58.** Pratt v. Pratt, 157 M. 503 (1892). **59.** Murphy v. Murphy, 249 M. 552 (1924). **60.** Googins v. Googins, 152 M. 533 (1890).

61. West Cambridge v. Lexington, 1 Pick. 506 (1823). **62.** Putnam v. Putnam, 8 Pick. 433 (1829). **63.** White v. White, 105 M. 325 (1870). **64.** Thompson v. Thompson, 114 M. 566 (1874). **65.** Clark v. Clark, 8 Cush. 385 (1851). **66.** Bullock v. Bullock, 122 M. 3 (1877). **67.** Comm. v. Lane, 113 M. 458 (1873). **68.** Comm.

v. Hunt, 4 Cush. 49 (1849). **69.** Brogi v. Brogi, 211 M. 512 (1912). **70.** Tyler v. Tyler, 170 M. 150 (1898). **71.** Chase v. Chase, 191 M. 166 (1906). **72.** Finer v. Steuer, 255 M. 611 (1926). **73.** Franklin v. Franklin, 154 M. 515 (1891). **74.** Martin v. Otis, 233 M. 491 (1919). **75.** Peck v. Peck, 155 M. 479 (1892). **76.** Donnelly v. Strong, 175 M. 157 (1900). **77.** Chipman v. Johnston, 237 M. 502 (1921). **78.** Maynard v. Tyler, 168 M. 107 (1897). **79.** Anders v. Anders, 224 M. 438 (1916). **80.** Sasserno v. Sasserno, 240 M. 583 (1922).

81. Day v. Day, 236 M. 362 (1920). **82.** Greenwood v. Curtis, 6 M. 358 (1810). **83.** Ross v. Ross, 129 M. 243 (1880). **84.** Blaisdell v. Bickum, 139 M. 250 (1885). **85.** Whippen v. Whippen, 171 M. 560 (1898).

MICHIGAN

REFERENCES: Compiled Laws of Michigan (four volumes), 1915; Supplement, 1922; Public Acts of Michigan, 1923, 1925, 1926 (extra session), 1927; Reports through Volume 235.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Compiled Laws, or to the Supplement where specified, and to session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Michigan section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—It shall be necessary for all parties intending to be married to obtain a marriage license and to deliver it to the officiant before the marriage can be performed (11376).

b. Issuer.—License is obtained from the county clerk of the county in which either party resides, or if both are non-residents, from the county clerk of the county in which the marriage is to be performed (11376). *A marriage in a county between non-residents thereof is valid though in securing a license one party makes a false affidavit as to residence in such county which by statute is cause for prosecution for perjury (1).* [Note: The judge of probate of each county shall issue a license without publicity to any female who makes application under oath, stating that she is pregnant or has lived with a man as his wife, or for other reason deemed sufficient by the judge she desires to keep the exact date of the marriage secret (11387).]

c. Compensation of Issuer.—The county clerk shall be entitled to a fee of 50 cents, to be paid by the applicant when license is issued (Sup. 11378). Such fees form a part of the clerk's compensation (2437), except in counties where the boards of supervisors have authorized salaries, in which cases all such fees shall be turned over to the county treasurer monthly (Sup. 2514–4), the clerk receiving as exclusive compensation the salary fixed by such board and paid from the general fund of the county (Sup. 2514–3). *Marriage license*

issuance being a duty in which the state as a whole is interested, the legislature by local act may provide a salary as sole compensation for a county clerk, in which case he pays over to the county the 50 cent fees and may retain further amounts collected for notarial service (*2*). [Note: A judge of probate issuing a special license in cases of cohabitation or pregnancy receives a fee of $3.00, $2.00 of which he keeps and $1.00 he forwards to the Secretary of State (11388).]

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No license shall be delivered within five days following the date of application, provided that the judge of probate, for sufficient cause shown, by a written order may authorize the clerk to deliver the license immediately (P.A. 1925, No. 107).

f. Minimum Age.—[No specific statutory provision as condition to license issuance. But see 11380 under 1k and Bonker v. People under 2g.] Every male of eighteen and every female of sixteen years shall be capable in law of contracting marriage, if otherwise competent (11362). No marriage, common law or ceremonial, shall be contracted in this state if the female is under sixteen, and any such marriage shall be void, provided that this shall not prohibit probate judges from exercising their powers to perform marriages in special cases (Sup. 11386–1). [See 11387 under 1b.] [Note: A county judge of probate may marry persons under marriageable age where the female is pregnant, or has been living with a man as his wife, if the application for license is accompanied by the written consent of the parents or guardians of the under-aged party or parties, and when in his judgment such marriage would benefit public morals (11387). *This act, conferring special authority, must be strictly complied with, including the request for license by the parent or guardian, before the judge may act* (*3*). *But if the pregnant female be over sixteen parental consent is not necessary to validate her marriage before the probate judge* (*4*).]

A marriage solemnized when either party was under the age of legal consent shall be deemed void without any legal process if the parties separate during such nonage and do not cohabit afterwards (11393), and a bill to annul such marriage may be exhibited by the parent or guardian or by the next friend of such minor (11422). *Though a marriage below the age of consent is null without judicial decree if the parties separate with consent of the one under age and do not cohabit after he has attained such age* (*5*, *6*, *7*), *the competent party by*

his desertion cannot annul the marriage (3, 5, 8) and the marriage becomes valid and binding by cohabitation after the incompetent party has attained the required age (8, 9). [Note: Though the marriage of persons of the age of legal consent is valid, the statute does not empower infants under twenty-one to make executory contracts to marry which will sustain action for breach of promise (10).]

g. Parental Consent.—Whenever it appears from the affidavit [see 11377 under 1k] that the female is under eighteen years, the county clerk shall not issue a license without first requiring the written consent of one of her parents, or her guardian, given personally in the presence of the clerk or acknowledged before a notary or other officer authorized to administer oaths, unless such female has no parent or guardian living. Such written consent shall be filed in the office of the clerk (Sup. 11378). *Want of consent of a stepfather, he not being the child's natural guardian, is immaterial (3). Penalty.* See 11380 under 1k. [Note: Any person enticing a female under sixteen years from her parents or guardian without their consent, for the purpose of marriage, shall be imprisoned in the state prison not exceeding three years, or in a county jail not exceeding one year, or fined not exceeding $1000 (15215).] [As to penalty for marrying inmate of industrial home for girls without consent of board of control, see 1928 under 4b.]

h. Mental and Physical Qualifications.—No insane person, idiot, or person who has been afflicted with syphilis or gonorrhea and has not been cured thereof, shall be capable of contracting marriage. No person who has been adjudged by a court to be insane, feeble-minded, epileptic, or imbecile, or has been confined in any public institution for such cause, shall be capable of contracting marriage without filing in the office of the clerk, before license is issued, a verified certificate from two regularly licensed physicians of this state that such person has been completely cured of such condition and that there is no probability of its transmission to the issue of the marriage (11367, as amended P.A. 1923, No. 7). *Penalties.* Violation of the provisions of this section as to marriage of a person with venereal disease is punishable by fine of from $500 to $1000, imprisonment not exceeding five years, or both; violation of the provisions by knowingly intermarrying with an insane or feeble-minded person, epileptic, or imbecile, without filing the certificate provided, or assisting in procuring such marriage, is punishable by fine not exceeding $1000 or imprisonment for from one to five years (11367, as amended P.A. 1923, No. 7). All marriages solemnized within this

state when either party was insane or an idiot shall be absolutely void without legal process (11392). *When a party to a marriage sets up its invalidity there must be clear proof that the insanity existed at the time of marriage (11). Though mere chastity is not a requisite to the validity of marriage (12), a marriage may be annulled for concealment of actual antenuptial pregnancy, caused by another person (12, 13, 14), even though the husband himself had had intercourse with the woman before marriage (15, 16, 17).* [*See* 4d.]

i. Form of License.—The blank forms for license and certificate shall be made in duplicate and shall provide spaces for the entry of the following items: for each party—the full name, age, color, residence, birthplace, occupation, father's name, mother's maiden name, and number of the marriage; date of the license; signature of the county clerk; date and place of the marriage; names and residences of two witnesses; and the certification of the officiant (11377).

j. Record of License.—The affidavit of competency made by the applicant, together with the license, shall be made a matter of record in the clerk's office (11377; Sup. 11378). [As to filing of parental consent, see 11378 under 1g.] *Penalty.* See 11380 under 1k.

k. Other Provisions.—As a basis for the issuing of the license the applicant shall cause to be filed with the county clerk an affidavit alleging the competency of the parties to intermarry (11377). The county clerk shall fill out the blank spaces of the license according to the sworn answers of the applicant, and if it appears that the parties are legally entitled to be married, he shall sign the license in certification of the fact that it is properly issued (Sup. 11378). *Penalties.* Any county clerk refusing to give a license to persons legally entitled thereto, or violating any of the provisions of this act, shall be fined from $25 to $100 or, in default of payment thereof, imprisoned for thirty days (11380). Any applicant for a license who shall swear to a false statement therein is guilty of perjury (11383), punishable by imprisonment not exceeding fifteen years (14972). *It is perjury to swear falsely in a license application that the intended bride, in fact under the age of consent, was sixteen (18).*

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by a justice of the peace or judge of probate in the county in which he was chosen, by a judge of a municipal court in the municipality in which he was

chosen, and throughout the state by any minister, ordained or authorized to solemnize marriages according to the usages of his denomination, who is pastor of a church or preaches the gospel in this state (11368), and among Quakers and members of any denomination having a peculiar mode of solemnization, according to the practice of such denomination (11374). *That the marriage was solemnized by a justice of the peace outside his county is immaterial to the validity of the marriage if it has elements sufficient for its validity according to the common law (19).* [Note: Upon filing of the application for a marriage license where the female is pregnant et cetera (see 11387 under 1b), the judge of probate shall perform the marriage ceremony unless the parties desire some other officiant, in which case the judge shall issue a written permit to the officiant designated directing him to perform the ceremony (11388).]

b. Officiant's Credentials.—No provision.

c. Presentation of License.—The license shall be delivered to the officiant before the marriage can be performed (11376). *Penalty.* Any officiant joining in marriage parties who have not delivered to him a properly issued license shall be fined $100 or, in default thereof, imprisoned for ninety days (11381). *The officiant is liable for solemnizing a marriage without a license regardless of the incapacity of the parties to contract it (20).*

d. Form of Ceremony.—No particular form is required, except that the parties shall solemnly declare in the presence of the officiant and the witnesses, of whom there shall be at least two besides the officiant, that they take each other as husband and wife (11370). *Penalty.* See 11371 under 2g. *To form the marriage contract a nod of the head may suffice as well as an oral response (21). Witnesses are not necessary to the validity of a marriage if valid according to the common law (22).* Marriages among Quakers, or people of any denomination having a peculiar mode of solemnizing marriages, may be solemnized according to the practice of such denominations (11374). *Marriages contracted according to custom among Indians living in their separate organized communities were valid if the parties were capable and an actual marriage was formed (23).*

e. Common Law Marriage.—No statutory provision as to validity. [Note: §11386–1 (cited under 1f) prohibits the marriage—"common law or ceremonial"—of a female under sixteen.] *Marriage may be validly contracted in Michigan according to the common law by present agreement to take each other as husband and wife and cohabitation there-*

under (8, 19, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36). To establish a common law marriage there must be actual voluntary consent plus cohabitation as recognition of the relationship (37): mere cohabitation without a mutual agreement does not suffice (38, 39), or a mere agreement without actual cohabitation as husband and wife (40, 41, 42). The agreement must be a present one and not a mere promise to marry in the future, followed by cohabitation (7, 32, 43). Though representations that a ceremony is not necessary do not affect the validity of a marriage otherwise valid by the common law (44), a common law marriage can be valid, of course, only in such circumstances as a ceremonial marriage would be valid (45). A contract to live as husband and wife forever, but each party to retain separate property rights, has been held not to constitute a valid marriage contract (27).

Although where a relation was illicit in origin a subsequent actual marriage will not be presumed from cohabitation and reputation as husband and wife after removal of the impediment to the marriage (46, 47), where the parties had a matrimonial intent cohabitation after removal of such impediment may establish a common law marriage (48, 49, 50, 51) if the parties had knowledge of the removal of the impediment and agreed to consider the relation as binding (52, 53) or even if the parties had no knowledge that the disability had been removed (54, 55 dictum).

f. Irregular Solemnization.—The validity of a marriage solemnized before a person professing to be an officiant shall be in no way affected on account of any want of jurisdiction in such supposed officiant, if consummated with the belief of the parties, or either of them, that they have been lawfully married (11373). *Penalty.* Any unauthorized person undertaking to join others in marriage shall be imprisoned for not more than one year, fined from $50 to $500, or both (11372).

g. Other Provisions.—All officiants are required, before solemnizing any marriage, to examine at least one of the parties on oath, which they are authorized to administer, as to the legality of the intended marriage (11369). *Penalties.* Any officiant joining persons in marriage contrary to this chapter on marriages and solemnization shall forfeit not more than $500 for every offense (11371). Any person undertaking to join others in marriage knowing that he is not lawfully authorized to do so or knowing of any legal impediment to the proposed marriage shall be imprisoned for not more than one year, fined from $50 to $500, or both (11372). *In order to make the officiant liable to penalty the impediment need not be one which would make the marriage absolutely void but may be anything in the way of a*

valid marriage, such as nonage which renders the marriage voidable only; marriages which are voidable the law does not authorize and to solemnize an unauthorized marriage is within the penalty (*56*).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant shall fill out the spaces of the certificate left blank for entry of the date and place of marriage, the names and residences of two witnesses, and his own signature in certification that the marriage has been performed by him. He shall deliver the duplicate license and certificate to one of the parties, and shall return the original to the issuer within ten days (11379). [As to officiant keeping a record of marriages, see 11379 under 3b.] Non-resident ministers authorized to solemnize marriages shall keep proper records and make returns as required (11368). [Note: The officiant performing a marriage ceremony in cases of pregnancy et cetera (see 11388 under 2a) shall deliver a certificate of marriage to the bride and shall return a certificate to the probate judge (11388).] *Penalties.* Any officiant violating any of the provisions of this act shall be fined $100 or, in default thereof, imprisoned for ninety days (11381). Any person neglecting to return a marriage certificate to the county clerk as required shall be fined not exceeding $100, imprisoned for ninety days, or both (11382).

b. Local Record.—The county clerk shall file in his office all licenses and certificates issued and returned, and shall record in the book of registration the date and place of the marriage, the names and residences of two witnesses, and the name of the officiant (Sup. 11378). *The clerk's records of marriages are open to public inspection for any lawful purpose* (*57*). The officiant shall keep in a book an accurate record of all marriages solemnized (11379). *Penalties.* See 11380 under 1k, and 11381 under 3a. [Note: In case of a marriage authorized by the probate judge on account of pregnancy et cetera (see 11388 under 2a) no record shall be made except by said judge (11388), who shall file all the papers in a private file (11389). Affidavits as to marriage of parties named in instruments affecting real estate may be recorded with the register of deeds of the county where said real estate is situated (11736).]

c. State Record.—The county clerk as often as once in three months shall make a report to the Secretary of State [now changed to State Commissioner of Health (Sup. 5612–1)] of all licenses and certificates issued and received (Sup. 11378), which reports shall be

filed in the office of the State Commissioner of Health and a proper record thereof made (11384). *Penalty.* See 11380 under 1k. [Note: Within ten days after a marriage on account of pregnancy or cohabitation (see 11387 under 1b) the judge of probate shall forward the duplicate of all the papers to the State Commissioner of Health, who shall file them in a private file which shall be open to inspection only upon the written order of the judge of any circuit or of the supreme court for such use as is therein designated, which order shall be made only upon the written request of the persons married or when necessary to protect property rights (11389). *Penalty.* For neglecting to make proper return, a probate judge performing the marriage ceremony shall be fined not exceeding $50, in addition to the penalties prescribed in the general laws of this state (11390).]

d. Evidence.—The original certificates and records of marriage made by the officiant and record thereof by the county clerk, or a duly certified copy of such record, shall be presumptive evidence of the fact of such marriage (12530). [This section supersedes §11375, which is practically identical.—G.M.] *Though a certificate of marriage properly recorded with the county clerk on time is admissible to prove a marriage (58), a certification of a clerk as to absence of a record is not admissible to disprove a marriage (22). A certificate of marriage in a foreign country, sufficient to prove performance of the ceremony, prima facie establishes the marriage (24), and a certified copy of a parochial matrimonial record in Ireland, properly authenticated by the registrar and the American consul, is admissible (59). But a marriage record of another state is not admissible if not certified and authenticated according to the act of Congress and rules of this state (60), or if the certificate lacks a statement of date and place of ceremony and officiant's residence and was recorded years later (61). Absence of a record of a marriage in a foreign country does not prove the invalidity of a marriage there contracted (28). A certificate of marriage is admissible to prove a marriage (62), though in criminal cases the parties must be identified (62, 63), foreign certificates are not admissible (29), and the accused is entitled to confrontation of witnesses against him (61). But a certificate of marriage is not admissible to prove the age of the parties from a statement therein (64).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (11364; 11365). Such marriages shall be absolutely void without legal process

(11392). *Penalty.* Persons intermarrying within the degree of consanguinity within which marriages are prohibited or declared by law incestuous and void shall be imprisoned not more than ten years (15478, as amended P.A. 1927, No. 36). *Marriage within the forbidden degrees is incestuous whether the parties are related legitimately or illegitimately and by the half or whole blood (65).*

b. Proper Civil and Racial Status.—All marriages heretofore contracted between white persons and those wholly or in part of African descent are hereby declared valid and the issue legitimate (11367, as amended P.A. 1923, No. 7). *Such marriages were void under a former statute (66).* *Penalty.* Any person marrying an inmate of an industrial home for girls without the consent of the board of control of such home shall be imprisoned in the state prison not exceeding two years or in the county jail not exceeding one year, fined not exceeding $500, or both (1928).

c. Proper Legal Status.—Marriage of a party having a former spouse living, unless the marriage with such former spouse shall have been dissolved, is prohibited (11366), and if solemnized within this state shall be absolutely void without legal process (11392). *The marriage of a person already married is void (26, 55, 67).* Any person having a spouse living who marries another, or continues to cohabit with such second spouse in this state, shall be imprisoned in the state prison not more than five years, or in the county jail not more than one year, or fined not exceeding $500 (15465), unless such former spouse has remained continually beyond the sea, or has voluntarily withdrawn and remained absent for five years together, not known to the other to be living within that time, or unless the party remarrying shall have good reason to believe such former spouse dead, or has been legally divorced (15466). [Note: Teaching or advocating polygamy or soliciting to a polygamous life is punishable by imprisonment of from two to ten years (15501; 15502).] *Though two actual marriages are necessary in a bigamy prosecution (68), a mere illicit relationship with a second person not sufficing (69), a later common law marriage, valid in form, may be just as bigamous as a later ceremonial marriage (30). That a marriage was otherwise illegal is no defense to a prosecution for bigamy (66).*

The court may provide in a divorce decree that the party against whom such divorce was granted shall not remarry within a fixed time, not to exceed two years, and remarriage contrary to such a provision shall be deemed bigamy (11434). *The statute does not authorize punishment for criminal contempt of one contracting a valid*

marriage abroad after a Michigan divorce decree forbidding remarriage within two years (70). There is a presumption in favor of the validity of a later marriage in the absence of evidence as to a prior marriage (9,71,72,73), and of a marriage solemnized by an authorized officiant (3).

d. Proper Consent of Parties.—Marriage is considered in law a civil contract, to which the consent of parties capable of contracting is essential (11363). *Consent must be real, deliberate, definite, and irrevocable: regardless of ceremony, positive dissent can create no marriage (67).* In case the consent of one party was obtained by force or fraud, and there shall have been no subsequent voluntary cohabitation, the marriage shall be void without legal process (11393). *The fraud necessary to invalidate a marriage must negative any consent to the marriage itself and not merely to the preliminary engagement (12). Deception as to antenuptial unchastity is not fraud allowing of annulment (12). But concealment of antenuptial pregnancy is sufficient fraud (13) if the husband himself had no premarital intercourse with the wife (14) or even if he did have relations with her, fornication not being a crime in Michigan (15, 17). Inducing a blind and almost deaf septuagenarian to marry, by use of liquor and drugs, in order to acquire his pension is ground for annulment (74). [Note: Tort action for deceit lies against a man who marries a woman on false representation that he is legally competent to marry when in fact married to another (75).] Frightening a callow youth into marriage by arrest for bastardy and magnifying dangers of prison may be duress allowing of annulment (76). Penalties.* Any person taking a woman unlawfully and against her will, and compelling her to marry him or any other person, shall be imprisoned for life or any term of years (15213). [Note: Taking a woman with intent to compel her marriage is punishable by imprisonment for not more than ten years (15214). §15494 makes the identical offense punishable by imprisonment for not more than thirty years.]

5. STATE SUPERVISION

The Secretary of State [now changed to State Commissioner of Health (Sup. 5612–1)] shall prepare and furnish to the county clerks blank forms for marriage license and certificate and for the affidavit alleging the competency of the parties, and also proper books of registration (11377).

6. INTERSTATE RELATIONS

No statutory provision. *A marriage is valid everywhere if valid where contracted (24, 70) or if valid by the law governing both parties*

when contracted (77). There must of course be an actual marriage (23). Though a marriage contracted in this state would be valid between citizens of Michigan, the public policy of another state prohibiting the marriage of its domiciliaries abroad in certain instances and creating an incapacity to marry will be enforced here so as to make their marriage in this state invalid (78). Mere penal restrictions forbidding remarriage after divorce have, however, no extraterritorial effect (70).

7. SEX OFFENSES AND MARRIAGE

In absence of a statute [such as now exists in Michigan—G.M.] marriage of the parties would bar prosecution for seduction regardless of the man's lack of good faith in marrying (79). [Note: Every man marrying to escape prosecution for rape, bastardy, or seduction and afterwards deserting without good cause shall be fined not more than $1000 or imprisoned not more than three years (7794).]

MICHIGAN CASES

1. Switchman's Union v. Gillerman, 196 M. 141 (1917). **2.** Board of Auditors v. Reynolds, 121 M. 99 (1899). **3.** People v. Schoonmaker, 117 M. 190 (1898); 119 M. 242 (1899). **4.** Radford v. Radford, 214 M. 545 (1921). **5.** People v. Slack, 15 M. 193 (1867). **6.** People v. Bennett, 39 M. 208 (1878). **7.** Griffin v. Griffin, 225 M. 253 (1923). **8.** People v. Pizzura, 211 M. 71 (1920). **9.** May v. Meade, 236 M. 109 (1926). **10.** Frost v. Vought, 37 M. 65 (1877). **11.** Van Haaften v. Van Haaften, 139 M. 479 (1905). **12.** Leavitt v. Leavitt, 13 M. 452 (1865). **13.** Nadra v. Nadra, 79 M. 591 (1890). **14.** Harrison v. Harrison, 94 M. 559 (1893). **15.** Sissung v. Sissung, 65 M. 168 (1887). **16.** Sylvester v. Sylvester, 180 M. 512 (1914). **17.** Gard v. Gard, 204 M. 255 (1918). **18.** People v. Thompson, 231 M. 256 (1925). **19.** People v. Girdler, 65 M. 68 (1887). **20.** People v. McGlaughlin, 108 M. 516 (1896).

21. People v. Taylor, 1 N.P. 198 (1870). **22.** People v. Goodrode, 132 M. 542 (1903). **23.** Compo v. Jackson Iron Co., 50 M. 578 (1883). **24.** Hutchins v. Kimmell, 31 M. 126 (1875). **25.** Meister v. Moore, 96 U.S. 76 (1877); reversing Meister v. Bissell, Fed. Cas. No. 9398 (1874). **26.** Peet v. Peet, 52 M. 464 (1884). **27.** Clancy v. Clancy, 66 M. 202 (1887). **28.** People v. Loomis, 106 M. 250 (1895). **29.** People v. Imes, 110 M. 250 (1896). **30.** People v. Mendenhall, 119 M. 404 (1899). **31.** Supreme Tent, K. of M. v. McAllister, 132 M. 69 (1902). **32.** Judson v. Judson, 147 M. 518 (1907). **33.** Brown v. Long M'f'g. Co., 213 M. 221 (1921). **34.**

Long v. Long, 217 M. 211 (1921). **35.** Pillard v. Pillard, 230 Mich. 575 (1925). **36.** Burns v. Stevens, 236 M. 443 (1926). **37.** Kopke v. People, 43 M. 41 (1880). **38.** McConnell v. McConnell, 211 M. 483 (1920). **39.** Lockwood v. Lockwood, 220 M. 124 (1922). **40.** People v. McQuaid, 85 M. 123 (1891).

41. Lorimer v. Lorimer, 124 M. 631 (1900). **42.** People v. Spencer, 199 M. 395 (1917). **43.** People v. Adams, 162 M. 371 (1910). **44.** People v. Seaman, 107 M. 348 (1895). **45.** Severance v. Severance, 197 M. 327 (1917). **46.** Rose v. Rose, 67 M. 619 (1888). **47.** Van Dusan v. Van Dusan, 97 M. 70 (1893). **48.** People v. Booth, 121 M. 131 (1899). **49.** Barker v. Valentine, 125 M. 336 (1900). **50.** Bechtel v. Barton, 147 M. 318 (1907). **51.** Goodspeed v. Goodspeed, 204 M. 44 (1918). **52.** Williams v. Kilburn, 88 M. 279 (1891). **53.** Flanagan v. Flanagan, 116 M. 185 (1898); 122 M. 386 (1899). **54.** In re Fitzgibbon's Estate, 162 M. 416 (1910). **55.** People v. Lewis, 221 M. 164 (1922). **56.** Bonker v. People, 37 M. 4 (1877). **57.** Kalamazoo Gazette Co. v. County Clerk, 148 M. 460 (1907). **58.** People v. Etter, 81 M. 570 (1890). **59.** Boyce v. McKenna, 211 M. 204 (1920). **60.** People v. Perriman, 72 M. 184 (1888).

61. People v. Lambert, 5 M. 349 (1858). **62.** People v. Broughton, 49 M. 339 (1882). **63.** People v. Isham, 109 M. 72 (1896). **64.** Passmore v. Passmore's Estate, 60 M. 463 (1886). **65.** People v. Jenness, 5 M. 305 (1858). **66.** People v. Brown, 34 M. 339 (1876). **67.** Roszel v. Roszel, 73 M. 133 (1888). **68.** People v. Sokol, 226 M. 267 (1924). **69.** In re Dettman's Estate, 195 M. 231 (1917). **70.** In re Crane, 170 M. 651 (1912). **71.** Dixon v. People, 18 M. 84 (1869). **72.** Wagoner v. Wagoner, 128 M. 635 (1901). **73.** Killackey v. Killackey, 156 M. 127 (1909). **74.** Gillett v. Gillett, 78 M. 184 (1889). **75.** Sears v. Wegner, 150 M. 388 (1907). **76.** Smith v. Smith, 51 M. 607 (1883). **77.** Kobogum v. Jackson Iron Co., 76 M. 498 (1889). **78.** People v. Steere, 184 M. 556 (1915). **79.** People v. Gould, 70 M. 240 (1888).

MINNESOTA

REFERENCES: General Statutes of Minnesota, 1923; Laws of Minnesota, 1925, 1927; Reports through Volume 168.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the General Statutes and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Minnesota section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Before any persons shall be joined in marriage, a license shall be obtained (8568). This provision does not apply to Quakers (8578). [*This requirement is directory only; see* 2e.]

b. Issuer.—Marriage license is obtained from the clerk of the district court of the county in which the woman resides or, if a non-resident, then from such clerk of the county where the marriage is to take place (8568). *Lack of residence in the county of application is a legal impediment* [see 8569 under 1k] *and a bar to license issuance* (*1*).

c. Compensation of Issuer.—The clerk's fee for administering the oath and issuing and recording the required papers is $2.00 (8569), which he pays over to the county treasury (7018) in those counties where by special act he receives a stated salary (200n).

d. Personal Appearance by Candidates.—The clerk shall examine upon oath the party applying for a license (8569).

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—Males of eighteen and females of sixteen years are capable of contracting marriage, and females of fifteen who have parental consent and whose applications have been approved after careful inquiry by the judge of the juvenile court of the county of their residence may receive licenses to marry (8563, as amended L. 1927, ch. 166). [As to penalty for solemnizing such marriage, see 10460 under 2g.] The clerk shall issue a license if satisfied that there

is no legal impediment to the marriage (8569). *Penalty.* See 8569 under 1g. *As the legislature intended lack of age to be included in the phrase "legal impediment," it is a bar to license issuance (1). A girl over the age of consent for marriage (formerly fifteen) is legally competent to marry with parental consent (2).* Marriage of a party incapable of assenting thereto for want of age may be annulled at the suit of the injured party (8581) if there was no cohabitation after attaining the age of legal consent (8583). *The marriage of a girl of thirteen years and eleven months is not void but voidable only by judicial decree at the election of the party under the age of legal consent (3).*

g. Parental Consent.—No license shall be issued for the marriage of persons under age—twenty-one for males and eighteen for females (8706)—and not previously married, unless the consent of the parents or guardians shall be personally given before the clerk or certified in writing attested by two witnesses, one of whom shall appear before the clerk and make oath that he saw the parents subscribe or heard them acknowledge the certificate (8569). *Penalty.* A clerk violating this provision shall forfeit not exceeding $1000 to the parties aggrieved (8569). *A conviction of perjury will be sustained for false oath in a license application that a fifteen-year-old girl was over eighteen (4).* [Note: Taking a female under eighteen years without the consent of her parent or guardian for the purpose of marriage is punishable by imprisonment not exceeding five years, fine not exceeding $1000, or both (10128). *The indictment for taking an unmarried girl of fifteen from her parents without their consent for the purpose of marriage is good although girls of fifteen could formerly marry, for the taking is the gist of the offense, not the marriage (5).*]

h. Mental and Physical Qualifications.—[No provision as specific condition to license issuance. See 8569 under 1k.] No marriage shall be contracted between persons either of whom is epileptic, imbecile, feeble-minded, or insane (8564). [As to penalty for solemnizing such marriage, see 10460 under 2g.] Marriage of a person incapable of assenting thereto for want of understanding is voidable at the suit of the injured party (8581), if there was no cohabitation after restoration to reason (8583). [See 8584 under 4d.] *The marriage of an epileptic, though forbidden, is not on that account subject to annulment, at least not unless induced by fraud or concealment (6). As the insanity necessary for annulment is such as would render the party incapable of assenting to the marriage contract, kleptomania, not affecting the cognizance of the nature and obligations of a contract, does not suffice (7).*

i. Form of Licence.—The issuing clerk shall attach his official seal (8569).

j. Record of License.—The clerk shall make a record of licenses issued (8569). *Penalty.* See 8569 under 1k.

k. Other Provisions.—The clerk shall examine the applicant upon oath relative to the legality of such marriage and, if satisfied that there is no legal impediment, shall issue the license (8569). *Penalty.* Any clerk knowingly issuing a license in any other manner than as provided shall forfeit not exceeding $1000 to the parties aggrieved (8569). *The clerk issuing a license for any prohibited marriage is subject to penalty (1, dictum).*

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by any justice of the peace in his county, and throughout the state by any judge of a court of record, the superintendent of the department for the deaf and dumb in the state school for the deaf and blind, by any licensed or ordained minister of the gospel in regular communion with a religious society (8565), by court commissioners (247), and among Quakers in their meetings (8578).

b. Officiant's Credentials.—Ministers, before they may solemnize marriages, must file a copy of their credentials with the clerk of the district court of some county, who shall give a certificate thereof; and the place of record of such credentials shall be endorsed upon each certificate of marriage granted by a minister (8566).

c. Presentation of License.—No specific provision. [See 8567 under 2g.]

d. Form of Ceremony.—The parties shall declare in the presence of the officiant and at least two other attending witnesses that they take each other as husband and wife (8570). Marriages may be solemnized among Quakers in the form heretofore practiced in their meetings (8578). *Marriages among Indians on a reservation, valid according to tribal custom, are recognized in Minnesota (8, 9).*

e. Common Law Marriage.—No statutory provision. *Marriage being by statute a civil contract, and regulations as to license and solemnization containing no express words of nullity, the consent of parties capable in law of contracting is alone essential (10), and no cohabitation*

or matrimonial reputation is necessary where an actual contract is proved (11). Although a presumption of marriage may not arise where the cohabitation is strictly secret (12, 13), a certain amount of matrimonial reputation may sustain a common law marriage even without general publicity (14). The presumption of marriage from cohabitation may be rebutted by evidence of the parties' conduct (15). Where an impediment to marriage is removed and the parties continue to cohabit as husband and wife, every presumption will be indulged in favor of a subsequent marriage, especially where legitimacy is concerned (10).

f. Irregular Solemnization.—The validity of a marriage solemnized before any person professing to be an authorized officiant shall not be affected on account of any want of authority in such person if the marriage was consummated with the belief of the parties or either of them that they were lawfully married (8577). *Even though the officiant were not authorized, his profession of authorization on the certificate would make the consummated marriage valid (16). Penalty.* Any person solemnizing a marriage knowing that he is not legally authorized is punishable by imprisonment not exceeding one year, fine not exceeding $500, or both (8576).

g. Other Provisions.—Every authorized officiant may examine the parties on oath, which he is authorized to administer, as to the legality of the intended marriage, and he shall not solemnize a marriage unless satisfied that there is no legal impediment (8567). *Penalties.* An officiant performing a marriage knowing any legal impediment thereto is punishable by imprisonment not exceeding one year, fine not exceeding $500, or both (8576). An officiant knowingly solemnizing the marriage of a person under the age of consent, or of an idiot or insane person, is guilty of a gross misdemeanor (10460), punishable by imprisonment for not more than one year or fine of not more than $1000 (9923). An authorized officiant knowingly solemnizing any marriage contrary to the provisions of this chapter shall forfeit for every offense not exceeding $500 or be imprisoned not exceeding one year (8575).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant shall give to each party a certificate of marriage specifying the names and residences of the parties and of at least two witnesses, and the time and place of marriage (8571). The officiant shall make a record of the marriage and

within one month shall file with the issuer a certificate of the facts mentioned in §8571 (8572). The officiant within one month shall file with the clerk of the district court of the county where the marriage took place a certificate of the facts above mentioned (8573), and the witnessing clerk of a Quaker meeting shall similarly file a certificate of marriage with such clerk of the district court, which certificate, however, shall be signed by at least six witnesses and shall be filed by the parties if the marriage does not take place in such meeting (8578). *Penalties.* Every officiant—witnessing clerk or party (8578)—neglecting to make and deliver the certificate to the clerk of the district court within the time specified shall forfeit not exceeding $100 (8574). An officiant wilfully making a false certificate of a marriage or pretended marriage shall forfeit for every offense not exceeding $500 or may be imprisoned not exceeding one year (8575).

b. Local Record.—The clerk of the district court shall file and record the certificate (8572; 8573). *Penalty.* A clerk who neglects to record such certificate shall forfeit not exceeding $100 (8574).

c. State Record.—No provision.

d. Evidence.—The original certificate and record of marriage made by the officiant as prescribed by law, and the record thereof or a certified copy, shall be prima facie evidence of marriage (9898). *The parties being identified, the certificate is presumptive evidence of marriage* (*16*). Evidence of the admissions of marriage by a defendant, of general repute or cohabitation as married persons, or other circumstantial evidence, shall be competent (9899).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (8564). Marriages prohibited on account of consanguinity, if solemnized within this state, shall be absolutely void without legal proceedings (8580). *Penalty.* Persons nearer of kin than first cousins having sexual relations are punishable by imprisonment not exceeding ten years (10182). [The marriage of persons nearer of kin than second cousins but not nearer than first cousins being void, relations thereunder would constitute fornication, punishable by imprisonment for not more than ninety days or fine of not more than $100 (10185).—G.M.] *A marriage within the prohibited degrees was held incestuous even before this precise statutory declaration to that effect* (*17*).

b. Proper Civil and Racial Status.—No provision.

c. Proper Legal Status.—No marriage shall be contracted while either party has a spouse living or within six months after either has been divorced from a former spouse (8564). *A marriage within six months after divorce is voidable only, not void, and until judicially dissolved is sufficient to support a prosecution for bigamy (18).* Marriages prohibited because of either party having a former spouse living shall be absolutely void without legal proceedings, except that where the former spouse has been absent for five successive years without being known to the party marrying again to be living within that time, the marriage is void only from the time its nullity is adjudged (8580). *A second marriage after expiration of the prescribed period is not void until its status is passed upon by a competent court, and until then it cannot be collaterally attacked (19). Penalty.* Bigamy is punishable by imprisonment not exceeding five years, but this does not extend to a person whose former spouse has been absent for the past five years without being known to him to be living and believed dead, or whose former marriage has been pronounced void, annulled, or dissolved (10180). *A party marrying a second time believing in the validity of a divorce decree in fact void is not protected from the penal consequences of his act (20). But the want of jurisdiction of a court decreeing a divorce must be clearly shown where the decree has stood for twenty years and new relationships have been formed on the basis of its validity (21).*

d. Proper Consent of Parties.—The consent of parties capable in law of contracting is essential to the validity of marriage (8562). When consent of either party has been obtained by force or fraud and there has been no subsequent voluntary cohabitation, the marriage is void from the time its nullity is adjudged on suit of the injured party (8581). *Concealment of kleptomania (7) or of previous confinement in an insane asylum is not such fraud as allows of annulment: the fraud must blot out all semblance of contract or impose unexpected obstacles detrimental to the marriage relation (22).* No marriage shall be adjudged a nullity at the suit of the party capable of contracting on the ground that the other party was idiotic or insane if such disability was known to the party capable of contracting at the time of marriage (8584).

5. STATE SUPERVISION

No provision.

6. INTERSTATE RELATIONS

No statutory provision. *The validity of a marriage depends upon the law of the place where the ceremony is performed (23) and a marriage valid where contracted is valid everywhere (8, 23).*

7. SEX OFFENSES AND MARRIAGE

Subsequent intermarriage of the parties bars prosecution for seduction (10131).

MINNESOTA CASES

1. State v. Randall, 166 M. 381 (1926). **2.** State ex rel. Evans v. District Court, 118 M. 170 (1912). **3.** State ex rel. Scott v. Lowell, 78 M. 166 (1899). **4.** State v. Day, 108 M. 121 (1909). **5.** State v. Sager, 99 M. 54 (1906). **6.** Behsman v. Behsman, 144 M. 95 (1919). **7.** Lewis v. Lewis, 44 M. 124 (1890). **8.** Earl v. Godley, 42 M. 361 (1890). **9.** La Framboise v. Day, 136 M. 239 (1917). **10.** State v. Worthingham, 23 M. 528 (1877). **11.** Hulett v. Carey, 66 M. 327 (1896). **12.** In re Terry's Estate, 58 M. 268 (1894). **13.** Heminway v. Miller, 87 M. 123 (1902). **14.** Shattuck v. Shattuck, 118 M. 60 (1912). **15.** Le Suer v. Le Suer, 122 M. 407 (1913). **16.** State v. Brecht, 41 M. 50 (1889). **17.** State v. Herges, 55 M. 464 (1893). **18.** State v. Yoder, 113 M. 503 (1911). **19.** Charles v. Charles, 41 M. 201 (1889). **20.** State v. Armington, 25 M. 29 (1878). **21.** McHenry v. Bracken, 93 M. 510 (1904). **22.** Robertson v. Roth, 163 M. 501 (1925). **23.** Lando v. Lando, 112 M. 257 (1910).

MISSISSIPPI

REFERENCES: Hemingway's Annotated Mississippi Code (two volumes), 1927; Reports through Volume 142.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Code. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Mississippi section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—A marriage shall not be contracted or solemnized unless a license therefor shall first have been duly issued, which license shall be essential to the validity of a marriage, except that no irregularity in the issuance of or omission in the license shall invalidate a marriage, and this section shall not invalidate a marriage good at common law (2732). *A license is indispensable for the validity of a marriage only if the parties do not cohabit after forming the marriage contract (1).* [*See* 2e.]

b. Issuer.—Licenses shall be issued by the clerk of the circuit court of the county in which the female usually resides (2728). *Want of authority in the clerk does not invalidate a marriage which would be good according to the common law (2). The clerk himself is liable for any official acts of a person whom he leaves in charge of the office in his absence (3).*

c. Compensation of Issuer.—Clerks of circuit courts shall receive as exclusive compensation the following fees, commissions, and salaries (1935): for issuing license, taking affidavit, and recording certificate of marriage, $3.00 (1938). [There is no provision for payment of the clerk other than by fees.—G.M.]

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—No statutory provision as condition to license issuance. [As to common law age of consent, see Introduction, page 9. As to implication that there can be annulment of the marriage of a person "within the age of legal consent," see 816 under 4c.]

g. Parental Consent.—The consent of the parents or guardian of a male under twenty-one or a female under eighteen years shall be given personally before the clerk or by a certificate proved by the oath of at least one credible witness (2728). *Inasmuch as the statute does not declare the nullity of a marriage for want of parental consent, a marriage without it is valid (2, 4). Penalty.* Unless the clerk has required of the applicant or some other credible person an affidavit that the parties have reached the ages prescribed by law for marrying without parental consent, if he issues a license without the requisites prescribed he shall be punished as for a misdemeanor (2728), by fine of not more than $500 and imprisonment for not more than six months, or either (1354). *A clerk issuing a license without parental consent acts at his own peril (5), and unless he requires an affidavit he is liable for mis-issuance of a license to a minor (4). But this liability does not attach in case the minor and the parents are residents of another state (6). The clerk is not civilly liable for the parent's loss of services of a minor daughter validly married under a license wrongly issued by him without parental consent (3).* [Note: Wilfully enticing away any child under fourteen years, with intent to conceal it from its parents or guardian, or for the purpose of marriage, is punishable by imprisonment in the penitentiary not exceeding ten years, or in the county jail not exceeding one year, fine not exceeding $1000, or both (845).]

h. Mental and Physical Qualifications.—[No statutory provision as condition to license issuance.] Insanity or idiocy at the time of marriage, unknown to the complainant, is ground for absolute divorce, as is the pregnancy of the wife by another person at the time of marriage unknown to the husband (1479). *Marriage may be annulled for mental incompetency existing at the time of contract only on clear and certain evidence (7, 8, 9). Though the competent party must have been ignorant of the other's disability in order to obtain a divorce (9), a statement that the other was "kind of off" is not sufficient to charge such person with knowledge (10).*

i. Form of License.—The license is directed to any authorized officiant (2728), and has attached the blank form for return (5580).

j. Record of License.—The clerk shall record the license, together with the affidavit that there is no legal cause to obstruct the marriage and the consent of the parent or guardian of a minor (2728). *Penalty.* See 2728 under 1k. The clerk of the circuit court in each county shall be the legal custodian of all records relating to marriage

licenses (2733). [As to report to the Bureau of Vital Statistics of licenses issued, see 5580 under 3c.]

k. Other Provisions.—The clerk shall take from the applicant for a license an affidavit that there is no legal cause to obstruct the marriage (2728). *Penalty.* A clerk issuing a license without the prerequisites prescribed, or in any other manner, is punishable as for a misdemeanor (2728), by fine of not more than $500 and imprisonment not more than six months, or either (1354). The clerk on issuing a license shall attach thereto and deliver to the applicant the blank form mentioned in §5579 (5580). [See 3a.] *Penalty.* See 5586 under 3a.

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized within this state by ordained ministers, judges of the supreme or the circuit court, chancellors, justices of the peace, and members of boards of supervisors, within their respective counties (2730), and by pastors of any religious society according to its rules (2731).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—Any authorized officiant may solemnize marriage between any persons producing a license granted as herein directed (2730), and a marriage shall not be solemnized unless a license therefor shall first have been duly issued (2732).

d. Form of Ceremony.—[No general provision.] The pastor of any religious society may join in marriage members of such society according to its rules (2731). [By implication of §2729, relating to returns of marriages, this provision is probably meant to include Quakers, Mennonists, or other societies solemnizing marriage by consent of parties taken in open congregation.—G.M.]

e. Common Law Marriage.—This section requiring a license for the validity of a marriage shall not be construed as invalidating any marriage good at common law (2732). *Prior to the code provision of 1892 in absence of a statute containing express words of nullity a marriage good at common law was valid notwithstanding statutory requirements (2, 11, 12, 13, 14). Though the Code of 1892 made a license essential to the validity of a marriage, since 1906 the present exception to that requirement makes common law marriages valid if followed by cohabitation (1).* [*See* 1a.] *To constitute a common law marriage*

there must be actual, bona fide consent (12) followed by actual cohabitation as husband and wife (13, 15). Cohabitation and recognition, though not themselves creating a common law marriage (16), may show the necessary consent to a marriage (11).

Though continued cohabitation in a relation which the parties knew to be illegal in its inception does not show that it became matrimonial after removal of the impediment (17, 18), where the parties in good faith originally intended a marriage which was in fact void, continuance in the relation after removal of the impediment is equivalent to a declaration that they did occupy and intend to continue to occupy the relation of husband and wife (1). Assumption of marital duties and announcement of the marriage are sufficient to show that an unlawful cohabitation has become matrimonial (14).

f. Irregular Solemnization.—No provision.

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant of a marriage or witnessing clerk[1] shall transmit a certificate thereof, signed by him, to the clerk who issued the license within three months after the marriage (2729; 2731). *Penalty.* For failure to transmit such certificate to the clerk within the time prescribed, the officiant shall forfeit $50 to the clerk who issued the license, who may sue therefor (2729). All persons hereafter contracting marriage shall fill in and sign at the time of the ceremony the blank forms furnished by the State Board of Health to the circuit clerk, and by the clerk to the parties, giving in detail the following information concerning both: full name, residence, race and color, age, single, widowed or divorced, birthplace, occupation, full name of parents, which report the officiant shall cause to be so executed and shall file with the issuer of the license within ten days after the ceremony; provided that the mailing of such report shall not relieve the officiant of his duty to return the regular certificate of marriage to the clerk as already provided for by law (5579). *Penalty.* Any person violating any of the provisions of this act or any rule of the State Board of Health relative to the making of said reports, failing to perform any duties so imposed or furnishing false information for the purpose of making incorrect records, shall be fined from $5.00 to $100, imprisoned in the county jail not exceeding sixty days, or both (5586).

b. Local Record.—The clerk of the circuit court in each county shall be the legal custodian of records relating to marriage licenses

[1] See Introduction, p. 24.

and certificates (2733). The clerk shall examine the records once a month, and on discovering any person in default shall issue a summons requiring a return of the certificate, the defaulter to pay costs (2729). *Penalty.* Any clerk of court knowingly failing to perform any duties or to keep any record required of him by law shall be fined not exceeding $1000, imprisoned not exceeding six months, or both (1089).

c. State Record.—All marriages hereafter occurring within the state shall be registered with the State Registrar of Vital Statistics at the state capitol (5576). The circuit clerk each month shall forward to the Bureau of Vital Statistics a list of all persons obtaining marriage licenses, showing the names and color of the parties, the address of the man, and the date of license issuance, and at the same time shall forward to said bureau all reports of marriages, signed by the parties and certified by the officiant, received by him during the previous month (5580). *Penalty.* See 5586 under 3a.

d. Evidence.—An exemplification of the officiant's recorded certificate of marriage shall be evidence thereof (2729). Any copy of the records of marriage certified by the State Registrar of Vital Statistics shall be received as prima facie evidence of the facts therein stated (5584). *To prove a marriage production by the officiant of the license and his certificate of marriage thereon is sufficient* (*15*).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (2725, 2726). All marriages prohibited by §§2725 and 2726 are incestuous and void (2726); and subject to absolute divorce (1479). [As to evasion of these provisions by marrying outside the state, see 794 and 2727 under 6.] *Penalty.* Persons marrying within the degrees prohibited by law shall be fined $500, imprisoned not longer than ten years, or both; and such marriage shall be void (1025). *Under a former statute the marriage of relatives by affinity, though incestuous, was not criminal* (*19*).

b. Proper Civil and Racial Status.—The marriage of a white person with a Negro, mulatto, or Mongolian, or a person having one-eighth or more of Negro or Mongolian blood, shall be unlawful and void, and any party to such a marriage on conviction shall be punished as for marriage within the prohibited degrees of consanguinity or affinity (2727). *Penalty.* See 1025 under 4a. *A constitutional*

amendment in 1869 legitimated then existing unions between white persons and Negroes (*11*). [As to evasion of this provision by marrying outside the state, see 794 and 2727 under 6.]

c. Proper Legal Status.—Marriage to some other person at the time of the pretended marriage between the parties is ground for absolute divorce being decreed to the injured party (1479) which shall adjudge the marriage void from the beginning and the issue illegitimate (1480). *A person already married cannot contract another marriage* (*17, 20*), *and any such attempted marriage is illegal* (*18*), *bigamous* (*21*), *and void* (*1, 20, 22, 23*). Every person having a spouse living who shall marry again, and every unmarried person who shall knowingly marry the spouse of another, shall be imprisoned not longer than ten years (815); but this shall not extend to any person whose spouse shall have been absent for seven successive years without being known to such person within that time to be living, or has remained without the United States continually for seven years; or to any person whose former marriage has been dissolved by a competent court, the decree not prohibiting remarriage, or annulled because contracted under the age of legal consent, or pronounced void (816). *It is not necessary that the indictment negative the exceptions to the bigamy statute* (*24*). *A marriage is valid if contracted after the presumption of the death of an absent spouse has arisen* (*21*) *and even if contracted before such presumption has arisen if a long period has elapsed thereafter during which the absentee has never been heard from* (*25, 26, 27*). *There is a presumption of the validity of a later marriage in absence of evidence concerning the termination of an earlier* (*14, 26, 27*). [Note: Teaching the doctrine of polygamy is punishable by fine of from $25 to $500, imprisonment of from one to six months, or both (1120).] A divorce decree granted for adultery, in the discretion of the court, may prohibit the guilty party from remarrying, in which case such party shall remain in law as a married person; provided that after one year the chancellor may permit the person to remarry on petition and satisfactory evidence of reformation (1480).

d. Proper Consent of Parties.—*Penalty.* Every person falsely personating another and marrying in such assumed character shall be imprisoned not exceeding ten years (932). *A marriage, if not ratified, may be annulled like any other contract for duress sufficient to deprive a person of his free will* (*28*), *if shown by clear and convincing proof to have dominated throughout the transaction* (*29*). *Penalty.* Every person taking any female over fourteen unlawfully, against her will,

and compelling her to marry him or any other person, shall be imprisoned for from five to fifteen years (786).

5. STATE SUPERVISION

The State Registrar of Vital Statistics shall carry into effect the provisions of this act on the registration of marriages and divorces and the rules of the State Board of Health relating thereto (5577). The State Board of Health shall formulate and promulgate regulations for the proper reporting and registration of records of marriages, prescribing the methods of making and forms to be used (5578).

6. INTERSTATE RELATIONS

Any attempt to evade prohibitions against consanguineous, affinitative, and miscegenetic marriages [see 4a and 4b] by marrying out of this state and returning to it shall be within them (2727). *Penalty.* Citizens or residents of this state, prohibited by its laws from intermarrying because of kindred or race, who shall go elsewhere to marry, shall marry in any other jurisdiction, and shall return to this state and cohabit as man and wife, shall be imprisoned not longer than ten years, fined $500, or both (794). *Unless the statute of another state creates an incapacity in a person divorced there, a prohibition of and penalty for remarriage has no extraterritorial effect upon a marriage validly contracted in this state (30).*

7. SEX OFFENSES AND MARRIAGE

No statutory provision. *In absence of a statute so providing, a subsequent unaccepted offer by a seducer to marry the prosecutrix will not bar the prosecution for seduction (31).*

MISSISSIPPI CASES

1. Sims v. Sims, 122 M. 745 (1920). **2.** Hargroves v. Thompson, 31 M. 211 (1856). **3.** Beard v. Holland, 59 M. 164 (1881). **4.** Holland v. Beard, 59 M. 161 (1881). **5.** Detterly v. Yeamans, 39 M. 475 (1860). **6.** Bates v. Stokes, 40 M. 56 (1866). **7.** Ward v. Dulaney, 23 M. 410 (1852). **8.** Powell v. Powell, 27 M. 783 (1854). **9.** Smith v. Smith, 47 M. 211 (1872). **10.** Wilson v. Wilson, 104 M. 347 (1913). **11.** Dickerson v. Brown, 49 M. 357 (1873). **12.** Rundle v. Pegram, 49 M. 751 (1874). **13.** Floyd v. Calvert, 53 M.

37 (1876). **14.** Howard v. Kelly, 111 M. 285 (1916). **15.** Taylor v. State, 52 M. 84 (1876).

16. Stevenson's Heirs v. McReary, 20 M. 9 (1849). **17.** Blanks v. Southern Ry. Co., 82 M. 703 (1903). **18.** Thompson v. Clay, 120 M. 190 (1919). **19.** Chancellor v. State, 47 M. 278 (1872). **20.** Clark v. Clark, 115 M. 726 (1917). **21.** Gibson v. State, 38 M. 313 (1860). **22.** Lane v. State, 82 M. 555 (1903). **23.** Aldridge v. Aldridge, 116 M. 385 (1917). **24.** McQueen v. State, 109 So. 799 (1926). **25.** Spears v. Burton, 31 M. 547 (1856). **26.** Wilkie v. Collins, 48 M. 496 (1873). **27.** Hickman v. Hickman, 126 M. 469 (1921). **28.** Marsh v. Whittington, 88 M. 400 (1906). **29.** Main v. Main, 113 M. 165 (1917). **30.** Crawford v. State, 73 M. 172 (1895). **31.** Williams v. State, 92 M. 70 (1907).

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REFERENCES: Revised Statutes of Missouri (three volumes), 1919; Supplement, 1927; Reports through Volume 313 Missouri and 219 Missouri Appeal Reports.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Revised Statutes unless the Supplement is specifically cited. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Missouri section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Previous to any marriage in this state a license for that purpose shall be obtained, and no marriage hereafter contracted shall be recognized as valid unless such license has been previously obtained (Sup. 7302). *This provision does not invalidate a marriage contracted without a license before its enactment* (*1*). [See 2e.]

b. Issuer.—County recorders and the recorder of the city of St. Louis shall issue licenses (7303).

c. Compensation of Issuer.—The recorder receives a fee of $1.00 for marriage license issuance (7304). In counties of from 80,000 to 150,000 (11080), of 150,000 to 500,000 (11041), and counties which contain a city of a population between 75,000 and 200,000 (11063), recorders receive an annual salary; and in such counties must pay over monthly to the county treasurer the fees received (11051, 11069, 11089). Circuit clerks who are ex-officio recorders, who are remunerated by salary in counties of over 7,000, pay over monthly to the county treasurer the fees received (Sup. 10995). Recorders who are not circuit clerks pay into the county treasury all fees over $4000 a year exclusive of expenses (10591). The fees of no county or municipal officer, exclusive of deputies' salaries, shall exceed yearly $10,000 (Const. Art. IX, §13).

d. Personal Appearance by Candidates.—No provision. [Note: When applied to by any person legally entitled to a license, the recorder shall issue the same (7303).]

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—No recorder shall issue a license for the marriage of any person under fifteen years except on order of the circuit or probate court of the county for good cause shown and such unusual conditions as make the marriage advisable (7308). *Penalty.* See 7309 under 1k. [As to penalty for solemnizing such marriages, see 3514 under 2g; as to a second marriage after a marriage contracted when the parties were under fifteen not giving rise to bigamy, see 3507 under 4c.] *The law of Missouri never followed the old common [ecclesiastical] law rule permitting infants under the age of consent—fourteen or twelve years—to contract imperfect marriages if over the age of seven (2).*

g. Parental Consent.—No recorder shall issue a license for the marriage of any male under twenty-one or any female under eighteen years without the consent of the father, mother, or guardian, given at the time in writing, stating the residence of the person giving consent, signed and sworn to before an officer authorized to administer oaths. The recorder shall state in every license whether the parties are minors, and if either is a minor, the name of the person giving consent (7308). [*Note: The Attorney General has held that §370 as amended in 1921 to change the age of majority to twenty-one years in both sexes applies to §7308 and precludes issuance of license to females under twenty-one without parental consent (3).—G.M.*] *If the parent is not the child's guardian, the consent of the guardian, not the parent, is necessary (4). Penalty.* See 7309 under 1k. [As to penalty on officiant, see 3514 under 2g.] *If the party is actually a minor, an honest mistake as to his age is no protection (5, 6); the burden of proving the consent to have been actually obtained is on the defendant (7). Consent can be given in no other way than as prescribed by statute, and an oath of an applicant as to parental consent, not being authorized, does not give rise to a prosecution for perjury (8). An indictment for a false affidavit of age must allege not only that the affiant did not know the party to be over the prescribed age but that he knew the party to be under such age (9).*

h. Mental and Physical Qualifications.—Marriages where either party is insane, imbecile, feeble-minded, or epileptic are prohibited and declared absolutely void; and issuance of a license to any such person shall be unlawful (Sup. 7299). *Penalty.* See 7299 under 1k. [As to penalty for solemnizing a marriage with cause to believe the parties mentally incompetent, see 3514 under 2g.] *Want of*

mental capacity, shown by clear evidence (10), will avoid a marriage contract if a party has insufficient mind to comprehend the nature and obligations of the marriage relation (11, 12). Such incompetency must be shown by something more than an unhealthy mental state (12), a paralytic stroke causing inability to speak (13), or mere commitment to guardianship as of unsound mind (14). Where, however, there can be no physical manifestation of assent there may be no mental consent necessary to the marriage (15). The condition of mind at the time of the marriage contract governs capacity (16, 17), temporary insanity existing at the time of marriage being sufficient for annulment (16) and continuance of the marriage relation during a period of lucidity constituting ratification (17). Though a marriage is subject to attack for incompetency generally only in a direct proceeding (13), there may at times be a declaration of nullity after the death of the incompetent party (10, 15).

The state, being an interested party in every marriage contract, considers legally wrong the marriage of a person afflicted with a communicable venereal disease (18) and allows annulment (18, 19). The husband may obtain an absolute divorce where at the time of contracting marriage the wife, without his knowledge, was pregnant by another man (1801). *Misrepresentation that the man is the cause of the woman's pregnancy, which fraud induced the marriage, allows of divorce when in fact another man was the cause of such condition (20).*

i. Form of License.—The license, addressed to any officiant, authorizes the marriage of the persons whose names and addresses appear; blanks are left as to whether the age of the male is over or under twenty-one and the female over or under eighteen, and if under, then a statement that the consent of the parent or guardian has been given (7303). [See 7308 under 1g.]

j. Record of License.—The recorder shall record all licenses issued, with the returns thereon (7304). *A record must be made not only when the certificate is returned but when the license is issued (21). Penalty.* For failure to record the license, with the return thereon, or for wilfully making a false record, the recorder shall be fined from $5.00 to $100 (7305).

k. Other Provisions.—It shall be unlawful for any issuer to issue license for the intermarriage of persons related within the prohibited degrees, or of white persons and Negroes or white persons and Mongolians (Sup. 7299). *Penalties.* Any recorder issuing a license contrary to this chapter shall be fined not exceeding $500, and in addition shall be subject to a civil action by the parent to whom

services are due, wherein the recovery shall not exceed $500 (7309). *Under a former statute the license issuer was not subject to a civil penalty* (*22*). For wilfully neglecting to issue license to persons legally entitled thereto, on tender of the fee, the recorder shall be fined from $5.00 to $100 (7305). Any official issuing a license knowing the parties to be prohibited from intermarrying because of relationship, racial differences, or mental incapacity [see 1h] is guilty of a misdemeanor (Sup. 7299), punishable by imprisonment not exceeding one year, fine not exceeding $1000, or both (3701). [Note: Every officer convicted of neglect to perform any duty prescribed by law shall be fined not exceeding $500, imprisoned not exceeding one year, or both (3198).]

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by any judge of a court of record, justice of the peace, or licensed or ordained preacher who is a citizen of the United States or a resident of this state and a pastor of any church therein (7301).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—The license authorizes any officiant to solemnize the marriage (7303). *Penalty.* Any person solemnizing a marriage where the parties have not obtained a license shall be fined not exceeding $500, and in addition shall be subject to a civil action by the parent to whom services are due wherein the recovery shall not exceed $500 (7309).

d. Form of Ceremony.—No statutory provision. *Among Indians cohabitation by consent for an indefinite period for the purpose of procreating and rearing children constituted marriage* (*23*, *24*, *25*), *at least if the parties were in Indian territory and not in a place subject to Missouri law under which marriage is a relation of permanence with mutual rights and obligations* (*26*).

e. Common Law Marriage.—No marriage contracted after 1921 shall be recognized as valid unless solemnized by an authorized officiant, and common law marriages thereafter contracted shall be null and void (Sup. 7302). *Prior to the enactment of this provision in the absence of a statutory declaration of the nullity of marriages not contracted as prescribed, an agreement of competent parties to live together as husband and wife, followed by actual cohabitation, constituted a valid marriage without solemnization* (*27*, *28*, *29*, *30*, *31*, *32*, *33*, *34*, *35*,

36). For such common law marriage there had to be a present contract (32, 37, 38) plus an immediate connubial relationship (38, 39). Cohabitation under the agreement may even have been unnecessary (34). Though cohabitation and reputation as husband and wife did not themselves constitute a common law marriage (40, 41), they did raise a presumption that a valid common law marriage had been contracted (40, 41, 42, 43, 44, 45, 46, 47), if both existed (42), if the cohabitation was matrimonial (48, 49), and if the reputation was general (50) and showed a permanent status (48, 49). Any such presumption could, of course, have been overcome by evidence showing no marriage to have been contracted (37, 51). The agreement had to have a matrimonial intent and permanence (52, 53). Though the present statute abolishes common law marriages, those contracted before its enactment are nevertheless valid (1). Where a ceremonial marriage was originally void because of an existing marriage of one of the parties, continued cohabitation and recognition of the parties as husband and wife after removal of the impediment constituted a binding common law marriage (33, 54, 55, 56), at least if one (55) or both of the parties originally acted in good faith (54). If the relation was originally illicit it was presumed to continue so (57). [Common law marriages being no longer valid, continued cohabitation after the removal of an impediment since 1921 probably does not constitute marriage.—G.M.]

f. Irregular Solemnization.—The validity of a marriage shall not be affected by any want of authority in the person solemnizing it, if consummated with the full belief of the persons married, or either of them, that it is lawful (Sup. 7302). *Penalty.* Every unauthorized person representing himself as a legally authorized officiant and pretending to join in marriage parties believing such marriage legal shall be punished by imprisonment not exceeding one year, fine not less than $500, or both (Sup. 3514).

g. Other Provisions.—*Penalty.* Every person solemnizing a marriage having knowledge of any fact which renders such marriage unlawful or criminal, or having reasonable cause to believe either of the parties to be under the age of legal consent, or insane, imbecile, feeble-minded, or epileptic, or where to his knowledge any other legal impediment exists, shall be imprisoned not exceeding one year, fined not less than $500, or both (Sup. 3514). *An honest mistake of an officiant as to the age of a party is no protection (5, 6). Under a former statute at least, a confederate who aided in procuring the celebration of a marriage of a minor without parental consent was not liable (58). [Note: The salary provided for justices of the peace in lieu of all fees is remu-*

neration for judicial acts only, and a justice may keep fees collected for solemnizing marriage (59).]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant shall deliver to the parties a certificate of the marriage, furnished in blank by the license issuer, setting forth the names and residence of the parties, the place and date of license issuance, and date of marriage (7307). The officiant shall certify the marriage on the license within ninety days after its issuance and shall return such license to the issuer (7303). *Penalty.* Every person failing to return a license within ninety days after its issuance, or making a false return, shall be fined from $5.00 to $100 (7305). *When an authorized officiant chooses to solemnize a marriage he must preserve the evidence required by statute or subject himself to penalty (60).* [As to certification to the grand jury by the recorder of a list of marriage licenses issued and not returned, see 7306 under 3b.] [Note: The parties may give to the officiant the names of children born to them previous to the ceremony, and he shall record such names with the marriage certificate (7310).]

b. Local Record.—The recorder shall record all licenses, with the returns thereon (7304), and all marriage certificates (10568). *Penalties.* For failure to record any license, with the return, or for wilfully making a false record, the recorder shall be fined from $5.00 to $100 (7305). Any officiant failing to keep a record of the solemnization of any marriage shall be fined not exceeding $500, and in addition shall be subject to a civil action by the parent to whom services are due wherein the recovery shall not exceed $500 (7309). [Note: The recorder of deeds of each county shall certify to the grand jury a list of all licenses issued by him and not returned by the officiant within ninety days (7306). *Penalty.* For failure to certify such list the recorder shall be fined from $5.00 to $25 (7306). *Were a record not made of the licenses when issued no such list could be returned to the grand jury (21).* [See 1j.] Where marriage records have been lost or destroyed, the officiant, witnesses, and parties interested may make certificates of the marriage, the record of which, or a certified copy, shall be evidence (10613 ff.). In cities of the first class, the mayor and council by ordinance, or the health department (7920), may provide for the registration of marriages (7674).]

c. State Record.—No provision.

d. Evidence.—Record books of marriages kept by recorders according to law, or certified copies, are evidence in all courts (5392). So too, properly attested public records of sister states (5348), and the marriage record of any religious society in this state kept according to the custom of such society (5352). *For a foreign record of marriages to be admissible it must be authenticated according to the Act of Congress (61).* Marriage certificates shall be prima facie evidence of the facts therein stated (7307). [See 7307 under 3a and 10613 ff. under 3b.] *Where a marriage is established by a certificate, the burden is on the opponent to prove its dissolution (62).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Marriages within the stated degrees are prohibited and absolutely void (Sup. 7299). *Penalty.* Parents and children of every degree, brothers and sisters, uncles and nieces, or aunts and nephews who shall intermarry shall be imprisoned not exceeding seven years (3511). *Our statute specifying relationships by the half blood as to brothers and sisters and not specifying as to uncles and nieces shows that intercourse between a man and the daughter of his half-sister is not incest (63).* [The marriage of first cousins, though absolutely void, is not incest, but living together thereunder might be considered lewd and lascivious cohabitation (3515), punishable by imprisonment not exceeding one year, fine not exceeding $1000, or both (3701).—G.M.] [As to penalty for issuing a license for the intermarriage of such persons, see 7299 under 1k.]

b. Proper Civil and Racial Status.—All marriages between white persons and Negroes or white persons and Mongolians are prohibited and declared absolutely void (Sup. 7299). [As to penalty for issuing licenses for such marriages, see 7299 under 1k.] *Penalty.* A person having one-eighth or more of Negro blood and a white person shall not intermarry. Violation of this section is punishable by imprisonment in the penitentiary for two years or in jail not less than three months, by fine of not less than $100, or both (3513). [As to penalty for marriage between a white person and a Mongolian, see comment under 4a.] *Interracial marriages are forbidden and illegal (64), and the act making them so is constitutional (65).*

Inasmuch as a sentence to the penitentiary causes civil death and creates an incapacity to make any contract whatsoever, a formal marriage ceremony of a convict establishes no matrimonial status (66).

c. Proper Legal Status.—All marriages where either of the parties has a former spouse living shall be void, unless the former marriage has been dissolved (7300), and are cause for divorce by the injured party (1801). *The marriage of a person already married is void (19, 67, 68, 69, 70), confers upon the person already married no property rights (71), and creates no incapacity to marry a third time after dissolution of the first marriage (19, 70). If both parties know of the subsistence of the prior marriage their relation is mere adultery (69).* Every person having a spouse living who shall marry another shall be imprisoned in the penitentiary not exceeding five years, or in the county jail not less than six months, or fined not less than $500, or punished by both fine of not less than $100 and imprisonment in the county jail for not less than three months (3506). The last section shall not apply in the following cases: where the former spouse has been absent for seven successive years without being known to such person to be living, or has remained without the United States for seven successive years; where the former marriage has been dissolved and such person is not by law prohibited from remarrying; where the former marriage has been declared void, or was contracted under the age of legal consent (fifteen years); or where the former spouse has been sentenced to life imprisonment (3507). *The mere belief that the former spouse has been divorced is no defense if the marriage in fact subsists (72). Though the presumption of death of a spouse after seven years' absence which still continues, plus good faith in the party remarrying, is sufficient to establish the validity of the second marriage (73), if the absentee is in fact alive the statute protects the one remarrying only from criminal prosecution and does not validate the later marriage (67). The provisions of such a beneficent statute as to remarriage after absence should not be allowed to be invoked in favor of the one who voluntarily caused the absence (74).*

d. Proper Consent of Parties.—Marriage is considered in law a civil contract to which the consent of parties capable of contracting is essential (7298). *Lack of matrimonial intention on the part of one party does not prove the invalidity of the marriage where the other party entered the contract in good faith believing that a marriage was being created (43). A marriage procured by fraud can be vacated only at the instance of the injured party (10).* Where either party has been convicted of an infamous crime, unknown to the other at the time of marriage, the injured party may obtain an absolute divorce (1801). *So if a man has married a woman not knowing her to have been convicted of petit larceny (75). [As to misrepresentation of cause of pregnancy,*

see case under 1801 *under* 1h.] *To allow of annulment for duress, the action must not be voluntary in the legal sense (76), but must be induced by actual or threatened violence, exercised at the time of marriage, sufficient to overcome the mind and will of a person of ordinary firmness (77). Any existing moral obligation to marry will be weighed against possible inducement by violence as a motive for the marriage (78).* *Penalties.* Every person taking any woman unlawfully against her will and compelling her to marry him or any other person shall be imprisoned not less than three years (3250). [Note: Detaining a woman with intent to compel her marriage is punishable by fine of from $100 to $1000 or by imprisonment of from two to five years (3251).] *Continuance of marital relations after regaining ability to consent to marriage constitutes ratification (17).*

5. STATE SUPERVISION

No provision.

6. INTERSTATE RELATIONS

No statutory provision. *A marriage valid where contracted is valid everywhere (23, 79), even if contracted in an Indian tribe (24). A penal provision of another state prohibiting remarriage after divorce has no extraterritorial effect upon a marriage validly contracted elsewhere (79, 80).*

7. SEX OFFENSES AND MARRIAGE

Where the defendant, before the jury is sworn, marries the woman seduced, further prosecution shall be dismissed, but an offer to marry is no defense (3259). *Only actual marriage and not a mere offer is a bar to prosecution (81). If the defendant took a girl under eighteen years from her parent or guardian for the purpose of concubinage, contrary to statute, the original intent alone being important a later common law marriage between the parties is no defense (82).*

MISSOURI CASES

1. Randazzo v. Randazzo, 236 S.W. 1061 (1922). **2.** Bellamy v. Whitsell, 123 App. 610 (1907). **3.** Opinion of Attorney General, 10 June, 1921. **4.** Vaughn v. McQueen, 9 M. 330 (1845). **5.** Beckham v. Nacke, 56 M. 546 (1874). **6.** State v. Griffith, 67 M. 287 (1878). **7.** Medlock v. Brown, 4 M. 379 (1836). **8.** State v. Carpenter, 164 M. 588 (1901). **9.** State v. Morgan, 225 S.W. 129

(1920). **10.** Henderson v. Henderson, 141 App. 540 (1910); affirmed, 265 M. 718 (1915). **11.** Chapline v. Stone, 77 App. 523 (1898). **12.** Slais v. Slais, 9 App. 96 (1880). **13.** In re Guthery v. Wetzel, 205 App. 664 (1920). **14.** Payne v. Burdette, 84 App. 332 (1900). **15.** Guthery v. Bell [Ball], 206 App. 570 (1921). **16.** Westermayer v. Westermayer, 216 App. 74 (1924). **17.** Gross v. Gross, 96 App. 486 (1902). **18.** Trammell v. Vaughan, 158 M. 214 (1900). **19.** Jordan v. Mo. and Kans. Telephone Co., 136 App. 192 (1909). **20.** Ritayik v. Ritayik, 202 App. 74 (1919).

21. State ex rel. Stephens v. Moore, 96 App. 431 (1902). **22.** Dunn v. Sanders, 48 App. 610 (1892). **23.** Johnson v. Johnson's Adm'r., 30 M. 72 (1860). **24.** Boyer v. Dively, 58 M. 510 (1875). **25.** La Riviere v. La Riviere, 77 M. 512 (1883); reversing 6 App. 600; later appeal, 97 M. 80 (1888). **26.** Banks v. Galbraith, 149 M. 529 (1899). **27.** Dyer v. Brannock, 66 M. 391 (1877); reversing 2 App. 432 (1876). **28.** Holabird v. Atlantic Mut. Life Ins. Co., Fed. Cas. 6587 (1873); 2 Dill. 166 (note). **29.** Watson v. Centennial Mut. Life Ass'n. 21 Fed. 698 (1884). **30.** U.S. v. Route, 33 Fed. 246 (1887). **31.** State v. Bittick, 103 M. 183 (1890). **32.** State v. Cooper, 103 M. 266 (1890). **33.** Adger v. Ackerman, 115 Fed. 124 (1902). **34.** Davis v. Stouffer, 132 App. 555 (1908). **35.** Pope v. Mo. Pacific Ry. Co., 175 S.W. 955 (1915). **36.** McIntyre v. Frisco Railway, 286 M. 234 (1920); certiorari denied, 255 U.S. 573. **37.** Adair v. Mette, 156 M. 496 (1900). **38.** Butterfield v. Ennis, 193 App. 638 (1916). **39.** Hollinghausen v. Ade, 289 M. 362 (1921). **40.** State v. St. John, 94 App. 229 (1902).

41. State v. Hansbrough, 181 M. 348 (1904). **42.** Cargile v. Wood, 63 M. 501 (1876). **43.** Imboden v. St. Louis Union Trust Co., 111 App. 220 (1905); later appeal, 128 App. 555 (1908). **44.** Plattner v. Plattner, 116 App. 405 (1905). **45.** Blair v. Paterson, 131 App. 122 (1908). **46.** State v. Harris, 283 M. 99 (1920). **47.** Hamlin v. Grogan, 257 Fed. 59 (1919). **48.** Bishop v. Brittain Investment Co., 229 M. 699 (1910). **49.** State v. Burkrey, 183 S.W. 328 (1916). **50.** Ashford v. Metropolitan Life Ins. Co., 80 App. 638 (1899). **51.** Topper v. Perry, 197 M. 531 (1906). **52.** Coy v. Humphreys, 142 App. 92 (1910). **53.** Arnold v. Arnold, 267 S.W. 950 (1925). **54.** U.S. v. Hays, 20 Fed. 710 (1884). **55.** Busch v. Busch [Busch v. Supreme Tent, K. of M.], 81 App. 562 (1899). **56.** State v. Rotter, 193 App. 110 (1916). **57.** Perkins v. Silverman, 284 M. 238 (1920). **58.** Alsup v. Ross, 24 M. 283 (1857). **59.** St. Louis v. Sommers, 148 M. 398 (1899). **60.** State v. Madden, 81 M. 421 (1884).

61. State v. Pinson, 291 M. 328 (1922). **62.** Woods v. Bishop Poultry Co., 259 S.W. 888 (1924). **63.** State v. Bartley, 304 M. 58 (1924). **64.** Keen v. Keen, 184 M. 358 (1904); dismissed, 201 U.S. 319. **65.** State v. Jackson, 80 M. 175 (1883). **66.** Jandro v. Jandro 246 S.W. 609 (1923). **67.** Pain v. Pain, 37 App. 110 (1889). **68.** Golden v. Whiteside, 109 App. 519 (1904). **69.** Stripe v. Meffert, 287 M. 366 (1921). **70.** State v. Wilson, 312 M. 84 (1925). **71.** Davis v. Cummins, 195 S.W. 752 (1917). **72.** State v. Trainer, 232 M. 240 (1911). **73.** Gilroy v. Brady, 195 M. 205 (1906). **74.** Snuffer v. Karr, 197 M. 182 (1906). **75.** Hartwig v. Hartwig, 160 App. 284 (1912). **76.** Blankenmiester v. Blankenmiester, 106 App. 390 (1904). **77.** Marre v. Marre, 184 App. 198 (1914). **78.** Meredith v. Meredith, 79 App. 636 (1899). **79.** Green v. McDowell, 210 App. 517 (1922). **80.** In re Leete, 205 App. 225 (1920). **81.** State v. Brandenburg, 118 M. 181 (1893). **82.** State v. Adams, 179 M. 334 (1904).

MONTANA

REFERENCES: Revised Codes of Montana (four volumes), 1921; Laws of Montana, 1923, 1924 (extraordinary session), 1925, 1927; Reports through Volume 76.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Revised Codes and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Montana section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Previous to the solemnization of any marriage in this state a license for that purpose must be obtained (5711). Though marriage must be licensed as provided in this chapter, noncompliance with its provisions does not invalidate any lawful marriage (5709).

b. Issuer.—License is obtained from the clerk of the district court of the county wherein the marriage is to take place (5711).

c. Compensation of Issuer.—The clerk of the district court shall receive a fee of $2.00 for issuing a marriage license (4918). County officers receive an annual salary (4867), which shall be exclusive compensation; all fees must be paid to the county treasurer (4864, as amended L. 1925, ch. 141).

d. Personal Appearance by Candidates.—Application for license may be made by either party or by his or her agent or attorney, or by mail (5715).

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—Males of eighteen years or upwards and females of sixteen or upwards, not otherwise disqualified, are capable of consenting to and consummating marriage (5696). If either party appears to be legally incompetent to marry, the clerk shall refuse a license (5714). A marriage contracted under the age of legal consent without the consent of the parent or guardian may be annulled,

provided there was no free cohabitation after attaining such age, on application of the under-aged party (5729) within two years after attaining the age of consent, or of his parent or guardian at any time before attaining such age (5730).

g. Parental Consent.—Where either party is a minor the clerk shall refuse to grant a license unless the consent of the father, if living, or if not, of the mother or guardian, is given in writing, proved by the testimony of at least one competent witness (5712; 5714). [Note: Males under twenty-one and females under eighteen years are minors (5673).] In case of a minor applying by mail for a license, the consent of the parent or guardian must be given in the form of an affidavit taken before a justice of the peace, notary public, or other person authorized to administer oaths (5715). [As to annulment of marriage contracted under age without parental consent, see 5729 and 5730 under 1f.]

h. Mental and Physical Qualifications.—The marriage of a feeble-minded person is void from the beginning (5699). If it shall appear that either party is legally incompetent to marry, or that there is any impediment in the way, the clerk shall refuse a license (5714). When either party was of unsound mind at the time of contracting, the marriage may be annulled unless there was free cohabitation after such party coming to reason (5729). If either party is incapable from physical causes of entering the marriage state, the marriage is voidable (5698). *A woman remains a man's wife and is entitled to temporary alimony and counsel fees until he proves her fraud in inducing the marriage when seriously infected with syphilis (1).*

i. Form of License.—The clerk shall state in the license the following information as to each party: name, residence, birthplace, age, color, parents' names, and whether previously married or divorced (5713).

j. Record of License.—Prior to issuance, the license shall be entered of record in the office of the clerk (5713). *Penalty.* See 10950 under 1k.

k. Other Provisions.—If, on such testimony being given [see 5713 under 1i], it shall appear that either party is legally incompetent to marry, or that there is any impediment in the way, the clerk shall refuse a license (5714). *Penalty.* Every wilful omission to perform any duty enjoined by law on any public officer is punishable as a misdemeanor (10950), by imprisonment not exceeding six months, fine

not exceeding $500, or both (10725). The clerk in his discretion may require the necessary information to be given under oath, which he is hereby authorized to administer. When parties apply by mail for a license, their statement of the facts required must be accompanied by an affidavit as to the correctness thereof, taken before a person authorized to administer oaths (5715).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by a justice of the supreme court, judge of the district court, justice of the peace, or mayor of any city, by a priest or minister of any denomination, and by religious societies according to their usages (5710).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—No authorized officiant shall perform a marriage ceremony until the parties have given him the license properly issued therefor (5716).

d. Form of Ceremony.—No particular form shall be required except that the parties shall solemnly declare in the presence of the officiant or of attending witnesses that they take each other as husband and wife, and in any case there shall be at least two witnesses present (5722). Marriages may be solemnized by religious societies according to their usage (5710).

e. Common Law Marriage.—Though marriage must be solemnized as provided in this chapter, non-compliance with its provisions does not invalidate any lawful marriage (5709). Consent alone will not constitute marriage; it must be followed by a solemnization, or by mutual and public assumption of the marital relation (5695). *To constitute a common law marriage the parties must agree to become husband and wife presently (2) and must thereafter cohabit so as to establish the "mutual and public assumption of the marital relation" (2, 3, 4): secret cohabitation does not suffice (3).*

Persons married without the solemnization provided for in §5710 must jointly make a declaration of marriage showing: the names, ages, and residences of the parties; the fact and time of marriage; and that the marriage has not been solemnized (5724). If no record of the solemnization of a marriage heretofore contracted be known to exist, the parties may join in a written declaration of such marriage, subscribed by them and attested by at least three witnesses (5725).

The declaration of marriage does not create but merely authenticates an existing relation which, independent of the declaration, must have all the necessary elements of marriage (2).

f. Irregular Solemnization.—The validity of a marriage solemnized before a person professing to have authority shall not be affected by any want of authority if consummated with a belief of the parties, or either of them, that it is lawful (5719).

g. Other Provisions.—*Penalties.* Any person solemnizing marriage within the state between a white person and a Negro, Chinese, or Japanese shall be fined $500, imprisoned for one month, or both (5704). Every authorized officiant knowingly solemnizing any incestuous or other marriage forbidden by law is punishable by fine of from $100 to $1000, imprisonment of from one to two years, or both (11212).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—After solemnizing a marriage the officiant shall give to each of the parties, on request, a certificate under his hand, specifying the names, ages, and residence of the parties, the time and place of the marriage, and the names and residences of at least two witnesses (5721). The officiant shall enter upon the license a certificate of the time and place of marriage, attested by two witnesses to the ceremony, and shall return the license and certificate to the issuer within thirty days after the marriage (5716). Declarations of marriages must be acknowledged and recorded in a like manner as marriage certificates (5726). [As to form of such declarations, see 5724 and 5725 under 2e.] *Penalties.* For neglecting to deliver a certificate to the clerk of the district court within thirty days after a marriage, the officiant shall forfeit from $10 to $50 (5718); and for wilfully making a false return of any marriage or pretended marriage to the county clerk, shall be fined from $100 to $1000, imprisoned from one to two years, or both (11213 and 11212). [Note: Marriage must be authenticated and recorded as provided in this chapter, but non-compliance with its provisions does not invalidate any lawful marriage (5709).]

b. Local Record.—The clerk of the district court shall record the certificate in the same book where the license is recorded (5716). Every county clerk, as ex-officio recorder, must keep an index of marriage certificates (4799). *Penalties.* Any clerk of the district court neglecting to record a certificate within one month after its

delivery shall forfeit from $10 to $50 (5718). Any person making a false record of any marriage return shall be fined from $100 to $1000, imprisoned for from one to two years, or both (11213 and 11212).

c. State Record.—No provision.

d. Evidence.—The original certificate of marriage and the record thereof by the clerk of the district court, or a copy of such record duly certified, shall be received in all courts as presumptive evidence of such marriage (5720). On trial for bigamy either marriage may be proved without the register, certificate, or other record evidence, by such evidence as is admissible to prove a marriage in other cases (11982).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Such marriages are incestuous and void from the beginning (5699). Either party to an incestuous or void marriage may proceed by judicial action to have the same so declared (5728). *Penalty.* Persons intermarrying within the degrees of consanguinity within which marriages are declared by law incestuous and void shall be imprisoned not exceeding ten years (11029). [As to penalty on officiant for solemnizing incestuous marriages, see 11212 under 2g.]

b. Proper Civil and Racial Status.—Every marriage hereafter contracted between a white person and a person of whole or part Negro blood, or a Chinese or Japanese person, shall be utterly null and void (5700; 5701; 5702). [As to making void such marriages contracted out of the state, see 5703 under 6; as to penalty for solemnization, see 5704 under 2g; and as to declaration of nullity, see 5728 under 4a.] [Inasmuch as such marriages are void, cohabitation thereunder would be punishable as open and notorious cohabitation in the state of fornication, by fine not exceeding $500, imprisonment not exceeding six months, or both (11006).—G.M.]

c. Proper Legal Status.—A subsequent marriage contracted during the life of a former spouse is illegal and void from the beginning, unless the former marriage has been annulled or dissolved, or unless the former spouse was absent and not known to the person marrying again to be living for the five preceding years, or was generally reputed and was believed by such person to be dead; in either of which cases the subsequent marriage is valid until its nullity is adjudged (5705). [As to declaration of nullity, see 5728 under 4a.]

The solemnization of a marriage of a person already married is void (*5*). Bigamy does not extend to any person whose former spouse has been absent for five successive years without being known to such person within that time to be living, or to any person whose former marriage has been pronounced void, annulled, or dissolved (11026). *Penalty.* Bigamy is punishable by fine not exceeding $2000 and by imprisonment not exceeding three years (11027). *The prohibition of remarriage within a period after divorce was repealed in 1895* (*6*). *The presumption in favor of the validity of an existing marriage puts on the contestant thereof the burden of proving the absence of a divorce from a prior marriage* (*7*).

d. Proper Consent of Parties.—Marriage is a personal relation arising out of a civil contract, to which the consent of capable parties is necessary (5695). *Penalty.* False personation of another and marriage or pretense of marriage in such assumed character, with or without the connivance of such other, is a felony (11406), punishable by imprisonment not exceeding five years (10724).

If the consent of either party be obtained by fraud or force, the marriage is voidable (5698). *Penalty.* Every person taking any woman unlawfully, against her will, and compelling her to marry him or any other person, shall be imprisoned from two to fourteen years (11004).

5. STATE SUPERVISION

No provision.

6. INTERSTATE RELATIONS

All marriages valid where contracted are valid in this state (5707). *Circumstances showing the creation of a marriage in Washington suffice to establish the marriage here* (*5*). Every marriage hereafter contracted without the state between a white person and a Negro, Chinese, or Japanese, either party being a former resident of Montana, shall be null and void within Montana (5703). [In case of bona fide change of domicil, quaere.—G.M.]

7. SEX OFFENSES AND MARRIAGE

The intermarriage of the parties subsequent to the commission of the offense of open and notorious cohabitation in the state of adultery or fornication is a bar to prosecution (11006); likewise for the offense of seduction (11007).

MONTANA CASES

1. State ex rel. Wooten v. District Court, 57 M. 517 (1920). **2.** State v. Newman, 66 M. 180 (1923). **3.** O'Malley v. O'Malley, 46 M. 549 (1913). **4.** In re Riley's Estate, 54 M. 17 (1917). **5.** In re Huston's Estate, 48 M. 524 (1914). **6.** State ex rel. Cotter v. District Court, 49 M. 146 (1914). **7.** Hadley v. Rash, 21 M. 170 (1898).

NEBRASKA

REFERENCES: Compiled Statutes of Nebraska, 1922; Session Laws, 1923 (including Special Session, 1922), 1925, 1927; Reports through Volume 113.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Compiled Statutes and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Nebraska section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Previous to the solemnization of any marriage in this state, a license for that purpose must be obtained, and no marriage hereafter contracted shall be recognized as valid unless such license has been previously obtained (1492, as amended S.L. 1925, ch. 84). *Prior to this enactment the requirement for license was directory only* (*1, 2, 3*). [Note: Indians and their descendants shall procure marriage licenses and have their marriages solemnized as is provided by the laws for the making of marriage contracts (1559). But marriages contracted according to Indian custom prior to 1913 are valid (1556).]

b. Issuer.—License is obtained from the county judge of the county wherein the marriage is to take place (1492, as amended S.L. 1925, ch. 84).

c. Compensation of Issuer.—For issuing marriage license, administering oath, and recording certificate the county judge is allowed a fee of $2.00 (2388, as amended S.L. 1925, ch. 98). County judges receive salaries (2394), and pay over to the county treasurer quarterly the funds received from fees (2396).

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision. [S.L. 1923, ch. 40, §2, requiring ten days' advance notice before license issuance, was repealed by S.L. 1925, ch. 84.—G.M.]

f. Minimum Age.—[No statutory provision as specific condition to license issuance. See 1495 under 1k.] At the time of marriage the male must be eighteen years or upwards and the female sixteen or upwards (1490, as amended S.L. 1923, ch. 40). A marriage solemnized when either party was under the age of legal consent is voidable if the parties separate during nonage and do not afterwards cohabit (1506), the action being maintainable by the parent or guardian of the party under age but never by the party who was of age at the time of marriage (1545). *The marriage of a person under the age of consent is voidable only upon separation before arriving at such age and is confirmed by cohabitation thereafter (4). As such marriages by parties competent by common law are valid until annulled in court, the intervening rights of third persons such as children are not suspended by the decree (5). A parent suing for annulment of the marriage of his son, contracted when under eighteen, is not liable for alimony (6).*

g. Parental Consent.—The written consent, under oath, of the parent or parents or guardian of a minor applicant shall be presented to the county judge before license is issued (1492, as amended S.L. 1925, ch. 84). [Note: All persons under twenty-one years of age are minors (1576).] No license shall be granted to a minor without the verbal consent, if present, or written consent if absent, of the father, if living, or if not, of the mother or guardian, which written consent shall be proved by the testimony of at least one competent witness (1493). [§1493 is in no way repealed by S.L. 1925, ch. 84, amending §1492, but presumably where it conflicts as to the method of giving parental consent, it is superseded by the later act.—G.M.] If either party is a minor and the consent mentioned in §1493 is not given, the judge shall refuse a license (1495). *Lack of parental consent to the marriage of parties over the age of legal consent does not affect the validity of the marriage (2), nor does the wrongful obtaining of a license by misrepresentation of age (3).*

h. Mental and Physical Qualifications.—Marriages are void when either party is insane or an idiot at the time of marriage. The term "idiot" shall include all persons who from whatever cause are mentally incompetent to enter into the marriage relation (1491). *Mere weakness of mind is not sufficient for annulment unless so great as to deprive of the power of consent (7, 8, 9). Though no greater mental incapacity is necessary to annul an unconsummated marriage than to annul any other contract, if a person has adequate mind to enter into a valid contract or to make a valid deed or will, he is able to contract matrimony (10).* [Note: Action for annulment for insanity or

idiocy may be brought by the next friend (1546), or by the lunatic after restoration of reason if there has been no free cohabitation thereafter (1547).]

No person afflicted with a venereal disease shall marry in the state, and no person adjudged imbecile or feeble-minded or afflicted with hereditary epilepsy or insanity shall marry in this state without first submitting to an operation for sterilization (1490, as amended S.L. 1923, ch. 40). The county judge before issuing a license shall require an affidavit from each applicant stating that said applicant is free from venereal disease (1492, as amended S.L. 1925, ch. 84).

i. Form of License.—The county judge shall state in the license the name, residence, birthplace, age, and color of each party, and the names of the parents of each (1494).

j. Record of License.—Prior to issuance, the license shall be entered of record in the office of the county judge (1494).

k. Other Provisions.—If it shall appear that either party is legally incompetent, or that there is any impediment in the way, the judge shall refuse a license (1495).

2. SOLEMNIZATION

a. Officiant.—The marriage ceremony may be performed by judges and justices of the peace, by preachers of the gospel authorized by their denominations to solemnize marriage (1496, as amended S.L. 1927, ch. 77), and by religious societies according to their rites (1503).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—No provision. [See, however, 1496 under 3a.]

d. Form of Ceremony.—No particular form shall be required, except that the parties shall solemnly declare in the presence of the officiant and the attending witnesses, of which there must be at least two besides the officiant, that they take each other as husband and wife (1497). Every religious society may join in marriage members of such society according to its customs (1503).

e. Common Law Marriage.—No marriage hereafter contracted shall be recognized as valid unless a license has been previously obtained and such marriage is solemnized by a legally authorized officiant (1492, as amended S.L. 1925, ch. 84). *Prior to this statute a common law marriage could be validly entered into in Nebraska, and the*

contract might be proved by evidence of matrimonial cohabitation and reputation (11, 12, 13, 14, 15, 16, 17, 18, 19).

Continued cohabitation after removal of an impediment existing at the time of a ceremonial marriage is proof of continued consent and establishes a valid marriage (20, 7), and where the relations were originally illicit and no new contract is expressed after removal of the impediment, the parties' conduct may show an assumption of the matrimonial status, even though the evidence as to marital consent was dubious (15). [This line of decisions may not apply to impediments removed since 1923 when common law marriages were abolished.—G.M.]

f. Irregular Solemnization.—The validity of a marriage solemnized before any person professing to be an authorized officiant shall not be affected by any want of jurisdiction in such person, if the marriage was consummated with the belief of the parties or either of them that it is lawful (1502). *So held, regardless of the man's intended deception (1). Penalties.* Any person joining others in marriage knowing that he is not legally authorized shall be fined not exceeding $500 or imprisoned not exceeding one year (1501). [As to penalty on guilty party, see 9764 under 4d.]

g. Other Provisions.—*Penalty.* Any person joining others in marriage knowing that he is not legally authorized, or knowing any legal impediment, shall be fined not exceeding $500 or imprisoned not exceeding one year (1501).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant shall give to each of the parties on request a certificate under his hand, specifying the names, ages, and residence of the parties, the time and place of the marriage, and the names of at least two witnesses (1498); and shall deliver to the county judge of the county in which the marriage took place (the license issuer), within fifteen days after the marriage, the license and a certificate containing these particulars (1499 and 1496, as amended S.L. 1927, ch. 77). The clerk or person presiding in a society joining its members in marriage shall transmit to the county judge a certificate of marriage, which shall be recorded as provided (1503). *Penalty.* Any person neglecting to deliver a marriage certificate to the county judge as required, or wilfully making a false certificate, shall be fined not exceeding $500 or imprisoned not exceeding one year (1501).

b. Local Record.—The county judge shall record the officiant's return in the same book where the license is recorded (1496, as

amended S.L. 1927, ch. 77) one month after receiving such return (1500). *Penalty.* For neglecting to record any certificate, or for wilfully making a false record, the county judge shall be fined not exceeding $500 or imprisoned not exceeding one year (1501).

c. State Record.—The county judge shall return annually to the secretary of the Department of Public Welfare, upon forms provided by the state, an abridged statement of all licenses issued, specifying: record number and date of license; full name, residence, color, age, birthplace, occupation, and domestic status of husband and wife; number of previous marriages; full name and birthplace of parents; date and place of marriage, and name of officiant; name of father or guardian where either person is under age (8246, as amended S.L. 1927, ch. 166). The Department of Public Welfare shall prepare annually statements relating to marriage in each county (8247). *Penalty.* For each neglect to make such return the county judge shall pay $25 to the use of the proper county (8246, as amended S.L. 1927, ch. 166).

d. Evidence.—The original certificate and the record thereof, or certified copy, shall be received in all courts as presumptive evidence of the fact of marriage (1504). *A marriage may be proved by a duly certified copy of the records of license issuance and celebration in another state (21), by the certificate of the officiant, and by testimony of a witness to the ceremony (22).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Marriages between first cousins of the whole blood are void (1491). *Marriages between first cousins, contracted elsewhere where valid, are valid in Nebraska (23).* Marriages within the other forbidden degrees are incestuous and absolutely void (9761). *Penalty.* Persons intermarrying within the degrees of consanguinity within which marriages are declared by §9761 incestuous and void shall be imprisoned for from five to fifteen years (9762). [Marriages of first cousins of the whole blood, though void by §1491, are seemingly not criminal other than as fornication. See 9786 under 4b.—G.M.]

b. Proper Civil and Racial Status.—Marriage between a white person and a person of one-eighth or more Negro, Japanese, or Chinese blood is void (1491). *Penalty.* Unmarried persons living together in a state of fornication shall be fined not exceeding $100 and imprisoned not exceeding six months (9786). [The marriage being void, cohabitation thereunder would constitute fornication.—G.M.]

c. Proper Legal Status.—A marriage contracted by a person having a living spouse is void (1491), and such person shall be imprisoned for from one to seven years, unless the former spouse shall have been continually and wilfully absent and unheard from for the five years next preceding such marriage (9760). *The innocent party may have a marriage annulled because of his spouse's prior, subsisting marriage (19). Although a married person will not be absolved from a marriage by believing, upon information apparently reliable, that his marriage has been dissolved (24), yet evidence of credible information of the spouse's death and of belief in it may be admissible (25). [Quaere, do these two decisions actually conflict?—G.M.] To establish the presumption of death the absent spouse must have been away from his usual resorts for the required period and not heard from though due inquiry is made (26).*

A divorce decree does not become final and operative until six months after trial and decision or until determination on appeal (1555). *The first marriage continues to subsist during this period (27) and, though a remarriage within such time is void (20, 28), it may become valid by continued cohabitation after expiration thereof (7, 20).* [*See* 2e.] *A promise made within the period to marry thereafter was valid under the former statute (28).*

d. Proper Consent of Parties.—In law marriage is considered a civil contract, to which the consent of capable parties is essential (1489). *Though consent is necessary to a marriage, a regular ceremony gone through ostensibly in good faith cannot be nullified by a previous agreement of the parties not to consider it binding, for that would allow of a dissolution of marriage by the parties themselves (29).* A marriage is voidable if the consent of one party was obtained by force or fraud, and there was no subsequent voluntary cohabitation (1506). *Even if a marriage is induced by threats, subsequent cohabitation thereunder would have to be involuntary to allow of annulment (30). Penalty.* Whoever takes or detains a female with intent to compel her to marry him or any other person, or upon pretense of marriage takes a female for the purpose of sexual intercourse with himself or any other person, shall be imprisoned for from one to ten years (9764).

5. STATE SUPERVISION

The Department of Public Welfare shall provide for the registration of marriages and shall promulgate and enforce necessary rules (8228, as amended S.L. 1927, ch. 166). [As to secretary of Department of Public Welfare prescribing forms for the registry of marriages see 8246 under 3c.]

6. INTERSTATE RELATIONS

All marriages valid where contracted are valid in this state (1505). *The validity of a marriage is determined by the law of the place where contracted and if valid there is valid everywhere (11, 14, 23, 29, 31), even though residents of a state go elsewhere to marry in purposeful evasion of the law of their domicil, unless the law of their domicil says expressly that such marriage shall have no validity there (32).*

7. SEX OFFENSES AND MARRIAGE

Marriage shall not be a defense to the crime of pandering (9765). *Though intermarriage of the parties to a bastardy proceeding should be encouraged as terminating litigation and rendering some justice to innocent offspring, there is no statute by which a court can compel a woman to accept an offer of marriage (33). Bastardy proceedings are not abated by a fraudulent marriage followed by immediate abandonment (34).*

NEBRASKA CASES

1. Haggin v. Haggin, 35 N. 375 (1892). **2.** Melcher v. Melcher, 102 N. 790 (1918). **3.** Baker v. Baker, 112 N. 738 (1924). **4.** Ward v. Laverty, 19 N. 429 (1886). **5.** Willits v. Willits, 76 N. 228 (1906). **6.** Caulk v. Caulk, 91 N. 638 (1912). **7.** Aldrich v. Steen, 71 N. 33 (1904). **8.** Svanda v. Svanda, 93 N. 404 (1913). **9.** Adams v. Scott, 93 N. 537 (1913). **10.** Kutch v. Kutch, 85 N. 702 (1909), and 88 N. 114 (1910). **11.** Gibson v. Gibson, 24 N. 394 (1888). **12.** Olson v. Peterson, 33 N. 358 (1891). **13.** Goodrich v. Cushman, 34 N. 460 (1892). **14.** Bailey v. State, 36 N. 808 (1893). **15.** University of Michigan v. McGuckin, 62 N. 489 (1901), and 64 N. 300 (1902). **16.** Sorensen v. Sorensen, 68 N. 500 and 509 (1903). **17.** Moore v. Flack, 77 N. 52 (1906).

18. Coad v. Coad, 87 N. 290 (1910). **19.** Reynoldson v. Reynoldson, 96 N. 270 (1914). **20.** Eaton v. Eaton, 66 N. 676 (1902). **21.** Boling v. State, 91 N. 599 (1912). **22.** Lord v. State, 17 N. 526 (1885). **23.** Staley v. State, 87 N. 539 (1910), and 89 N. 701 (1911). **24.** Reynolds v. State, 58 N. 49 (1899). **25.** Baker v. State, 86 N. 775 (1910). **26.** Thomas v. Thomas, 16 N. 553 (1884); later appeal, 19 N. 81 (1886). **27.** Holmberg v. Holmberg, 106 N. 717 (1921). **28.** Leininger Lumber Co. v. Dewey, 86 N. 659 (1910). **29.** Hills v. State, 61 N. 589 (1901). **30.** Kanaly v. Kanaly [Kanaly v. Bronson], 97 N. 322 (1914). **31.** Ortley v. Ross, 78 N. 339 (1907). **32.** State v. Hand, 87 N. 189 (1910). **33.** Kremling v. Lallman, 16 N. 280 (1884). **34.** Trayer v. Setzer, 72 N. 845 (1904).

NEVADA

REFERENCES: Revised Laws of Nevada (two volumes), 1912; Volume 3, 1919; Statutes of Nevada, 1920 (special session), 1921, 1923, 1925, 1927; Reports through Volume 49.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Revised Laws of 1912, unless Volume 3 is specifically cited, and to session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Nevada section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Previous to persons being joined in marriage, a license shall be obtained for that purpose (2341, as amended St. 1927, ch. 30). [*The provision is directory only. See* 2e.]

b. Issuer.—License is obtained from the county clerk of any county in the state (2341, as amended St. 1927, ch. 30).

c. Compensation of Issuer.—The clerk receives $1.00 as his fee for issuing the license and $1.00 to be paid to the county recorder for recording (2341, as amended St. 1927, ch. 30). [There is no provision for paying over the fees to the county treasury.—G.M.]

d. Personal Appearance by Candidates.—If the candidate applying cannot answer positively any questions with reference to the other party, the clerk shall require both parties to appear (2341, as amended St. 1927, ch. 30).

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—[No statutory provision as specific condition to license issuance. See 2341 under 1k.] Males of eighteen and females of sixteen years may be joined in marriage (2339). *This statute alters the common law as to ages only and not as to the consequences of marriage (1).* When either party is incapable for want of

age of assenting to a marriage it may be annulled (2355), unless there was cohabitation after attaining the legal age (2356).

g. Parental Consent.—Males under twenty-one and females under eighteen years must obtain the consent of their fathers or, if incapable, of their mothers or guardians (2339)—if they have not been previously married—given personally before the clerk or certified in writing attested by two witnesses, one of whom shall appear and swear that he saw the parent or guardian sign or heard him acknowledge the certificate of consent (2341, as amended St. 1927, ch. 30). *Lack of parental consent is not material to the validity of a marriage* (*1*). *Penalties.* See 2341 and 6828 under 1k.

h. Mental and Physical Qualifications.—[No statutory provision as condition to license issuance.] When either party is incapable for want of understanding of assenting to the marriage it may be annulled (2355), unless there was cohabitation after restoration of sanity (2356). *A person may be granted annulment if so intoxicated at the time as to be incapable of giving rational consent to the obligations imposed by marriage* (*2*).

i. Form of License.—The license shall give authority to any authorized officiant to solemnize a marriage between the parties named, whose addresses and domestic condition shall be given, and the time, place, and grounds of any divorce (2341, as amended St. 1927, ch. 30).

j. Record of License.—No provision. [As to transmission to the State Board of Health of the number of licenses issued, see 3c.]

k. Other Provisions.—The county clerk may require on oath of the party applying answers to the questions contained in the form of license, may inquire concerning the legality of the contemplated marriage, and if satisfied that no legal impediment exists, shall grant the license (2341, as amended St. 1927, ch. 30). *Penalties.* A clerk issuing a license in any other manner shall forfeit not exceeding $1000 to the party aggrieved (2341, as amended St. 1927, ch. 30). Every public officer wilfully disobeying any provision of law regulating his official conduct shall be guilty of a misdemeanor (6828), punishable by imprisonment for not more than six months, fine of not more than $500, or both (6285). Any person who, in procuring a marriage license, makes a false statement required by this section to be under oath is punishable by imprisonment not exceeding one year, fine not exceeding $1000, or both (2341, as amended St. 1927, ch. 30).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by any ordained minister of any religious society or congregation within the state, properly licensed, by any justice of the supreme court, judge of the district court—within his district (6479)—and justice of the peace in his county (2340, as amended St. 1925, ch. 148), or among Quakers according to their forms (2353).

b. Officiant's Credentials.—Any minister producing to any district court credentials of his being regularly ordained may receive a license to solemnize marriages so long as he continues a regular minister, which license he shall produce to the county clerk of every county in which he shall solemnize a marriage, who shall record the minister as an authorized officiant and shall note the issuing court (2340, as amended St. 1925, ch. 148).

c. Presentation of License.—The officiant must receive the parties' marriage license before performing the ceremony (2340, as amended St. 1925, ch. 148; 6479). *Penalty.* For failure so to require license the officiant is punishable by fine not exceeding $500, imprisonment not exceeding six months, or both (6480).

d. Form of Ceremony.—No particular form is required except that the parties shall declare in the presence of the officiant and at least two other witnesses that they take each other as husband and wife (2342). Marriages solemnized among Friends as practiced in their meetings are valid (2353).

e. Common Law Marriage.—Marriage is a civil contract (2338). *The statutes regulating marriage, containing no express clause of nullity, are directory only, and common law marriages are valid (3, 4). Presumption of a valid common law marriage may be based on continuous cohabitation (5) and other matrimonial conduct (6). If parties desire marriage and do what they can to render their union matrimonial but one of them is under a disability (e. g. his divorce not having become operative), their cohabitation thus matrimonially meant and continued after the disability is removed will make them husband and wife from the moment at which such disability ceases, although no circumstances indicate an express renewal of consent (4).*

f. Irregular Solemnization.—The validity of a marriage solemnized before a person professing to be an authorized officiant shall not be affected by the officiant's want of jurisdiction or authority if

consummated with the belief of the parties, or either of them, that they have been lawfully married (2349). *Penalty.* A person undertaking to celebrate a marriage knowing that he is not lawfully authorized to do so shall be fined not exceeding $500 and shall be imprisoned till such fine is paid (2348).

g. Other Provisions.—*Penalties.* A person joining others in marriage knowing any legal impediment shall be fined not exceeding $500 and shall be imprisoned until such fine is paid (2348). An authorized officiant knowingly performing a marriage ceremony between a white person and a person of the black, brown, yellow, or red race is guilty of a gross misdemeanor (6516; 6514), punishable by imprisonment of from six months to one year, fine of from $500 to $1000, or both (6284).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant shall give to each of the parties, if required, a marriage certificate specifying the names and residence of the parties and of at least two witnesses and the time and place of such marriage (2343). The officiant shall make a record thereof and within thirty days shall deliver to the recorder of deeds of the county where the license was issued a certificate containing the particulars mentioned in the preceding section (2344). *Penalties.* An officiant failing to deliver a certificate to the recorder within the time specified is punishable by a fine of from $20 to $500, imprisonment of from ten to fifty days, or both (2346). A person wilfully making a false certificate shall forfeit not exceeding $500 or be imprisoned not exceeding one year or both (2347).

b. Local Record.—The recorder of deeds shall record all such certificates (2345). *Penalty.* Every recorder whose fees have been tendered who fails to record such certificate is punishable by a fine of from $100 to $500, imprisonment of from fifty days to six months, or both (2346).

c. State Record.—No provision. [Note: County clerks shall transmit to the secretary of the State Board of Health twice a year the number of marriage licenses issued (p. 2894, §34, Vol. 3).]

d. Evidence.—Certificates and record of marriage and certified copies thereof shall be received as presumptive evidence of marriage (2350). Either marriage in a bigamy prosecution may be proved by such evidence as is admissible to prove marriage in other cases, with-

out register, certificate, or other record evidence (6456). [Note: The record of a minister's credentials or certificate thereof is good evidence of the minister's due authority to solemnize marriages (2340, as amended St. 1925, ch. 148).]

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (2339). Marriages within the prohibited degrees of consanguinity are absolutely void without legal process (2354). *Penalty.* Persons marrying within the degrees within which marriages are declared incestuous and void shall be imprisoned from one to ten years (6458).

b. Proper Civil and Racial Status.—It is unlawful for a white person to marry a person of the black, brown, yellow, or red race (6514). *Penalty.* Persons so marrying are guilty of a gross misdemeanor (6515), punishable by imprisonment of from six months to one year, fine of from $500 to $1000, or both (6284). [As to penalty on officiant, see 6516 under 2g.]

c. Proper Legal Status.—Marriages solemnized when either person has a former spouse living are absolutely void without legal process (2354; 2339). A person being married who marries another is punishable by a fine not exceeding $1000 and imprisonment of from one to five years, unless the spouse of the person marrying again has been continually absent from him for the five preceding years, the one marrying not knowing the other to be living within that time, or unless the marriage has been dissolved or declared void (6456).

d. Proper Consent of Parties.—Consent of parties capable in law of contracting is essential (2338). When either party is incapable of assenting for want of understanding or when fraud is proved, and there has been no subsequent voluntary cohabitation, the marriage is voidable (2355). *Inasmuch as a marriage alleged to have been procured by fraud remains in effect until the fraud is established, a defendant wife is entitled to temporary alimony and counsel fees* (7). *Penalty.* A person compelling the marriage of a woman against her will is punishable by imprisonment of from two to fourteen years, and the record of such conviction operates as a divorce (6444). [Note: A person taking a female with intent to compel her marriage is punishable by imprisonment of from two to twenty years (p. 3379, Vol. 3).]

5. STATE SUPERVISION

No provision.

6. INTERSTATE RELATIONS

No statutory provision.

NEVADA CASES

1. Fitzpatrick v. Fitzpatrick, 6 N. 63 (1870). **2.** McNee v. McNee, 237 Pac. 534 (1925). **3.** State v. Zichfeld, 23 N. 304 (1896). **4.** Clark v. Clark, 44 N. 44 (1920). **5.** Parker v. De Bernardi, 40 N. 361 (1917). **6.** Dahlquist v. Nevada Industrial Commission, 46 N. 107 (1922). **7.** Poupart v. District Court, 34 N. 336 (1912).

NEW HAMPSHIRE

REFERENCES: Public Laws of New Hampshire (two volumes), 1926; Public Acts of New Hampshire, 1927; Reports through Volume 84.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to chapter and section of the Public Laws and to Public Acts amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this New Hampshire section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—All persons proposing to be joined in marriage within the state shall cause notice of their intention to be entered (ch. 286, §22); and a certificate of intention shall be delivered to the officiant (ch. 286, §23). [The marriage license is called the certificate of intention to marry.—G.M.]

b. Issuer.—Notice of intention shall be entered in the office of the clerk of the town in which either party resides; if both are nonresidents, of the town in which the marriage is to be celebrated; or if there is no clerk in the town of their residence, of an adjoining town (ch. 286, §22). [Note: The city clerk shall have all the duties and powers incumbent upon or vested in the town clerks in towns, except where otherwise provided by law (ch. 53, §3).] *Entry of notice of intention need not be made in each of the towns where two parties respectively dwell (1).*

c. Compensation of Issuer.—The clerk shall receive from the parties a fee of $1.00 for making the record of notice and issuing his certificate of intention (ch. 286, §26). [There would seem to be no statutory provision for salaries to be paid to town clerks and no statutory requirement for the payment over of fees. Compensation is regulated by the individual towns. See ch. 42, §3 and §4, XXVII. —G.M.]

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—The clerk, not less than five days after the notice was entered in his office, shall deliver a certifi-

cate to the parties (ch. 286, §23), but on application to a justice of the superior court, judge of probate, or justice of a municipal court, within the county where the marriage is to be solemnized, the court for good cause shown may order that the period of five days be shortened (ch. 286, §24). [Note: The procedure for court dispensation is the same as provided in ch. 286, §7, cited under 1f (ch. 286, §25).]

f. Minimum Age.—No town clerk knowing or having reasonable cause to believe one of the parties to be under the age of consent—twenty for males and eighteen for females (ch. 286, §5)—shall issue a certificate of intention, unless permission for the marriage has been given (ch. 286, §8). [See ch. 286, §§6 and 7, hereinafter.] *Penalty.* Violation of the preceding section, or false statement as to age with intent to induce the clerk to issue a certificate for the marriage of a person below the age of consent, is punishable by fine of not more than $200, imprisonment for not more than six months, or both (ch. 286, §9). [As to penalty on a person celebrating or inducing the celebration of the marriage of parties under age, see ch. 286, §§8 and 9, under 2g.]

If special causes exist rendering marriage desirable, persons below the age of consent and above the age of fourteen if male and thirteen if female, with the parent or guardian of the under-aged party if there be such within the state, may apply in writing to a justice of the superior court, or the judge of probate of the county in which one of the under-aged parties resides, for permission to marry (ch. 286, §6), and such justice or judge if satisfied as to the special cause shall grant permission, which shall be filed with the court and certified by the clerk or registrar to the town clerk to whom application for certificate was made (ch. 286, §7).

Marriages of males below fourteen and females below thirteen years are null and void (ch. 286, §4). A marriage contracted below the age of consent—twenty for males and eighteen for females—may be annulled at the suit of the under-aged party or of his parent or guardian, unless confirmed after arriving at such age (ch. 286, §5). [As to exemption from bigamy of a person whose first marriage took place within the age of consent, see ch. 386, §6, under 4c.]

g. Parental Consent.—[See ch. 286, §6, under 1f, providing that the parent or guardian of a person under the age of consent may apply for permission for the marriage of such person.] *The marriage of a minor above the age of consent is valid though contracted in defiance of parental authority* (*2*).

h. Mental and Physical Qualifications.—Epileptic, imbecile, feeble-minded, idiotic, or insane persons shall not hereafter intermarry, or marry any other person within this state, unless the woman be over forty-five (ch. 286, §10), and no town clerk or other officer shall issue a certificate of intention for such marriage (ch. 286, §12). [Note: Should any question arise as to the applicant's disqualification, the State Board of Health, on request of the parties, may appoint a qualified person to determine any question of mental competency of the parties (ch. 286, §13). Superintendents of all schools and asylums for the mentally deficient shall turn in to the State Board of Health the names of all inmates who each year attain the age of fourteen, or are discharged or paroled from such institutions (ch. 286, §14).] The town clerk to whom application is made for a certificate of intention for the marriage of any person born subsequent to June 1, 1909, suspected as being epileptic, imbecile, feeble-minded, idiotic, or insane, shall forward such application to the State Board of Health for inspection, which board after investigation shall return the application, and if it finds that a certificate may not legally be granted, it shall so notify the clerk and the applicants (ch. 286, §15). *Penalty.* Violation of these provisions as to defective persons is punishable by fine of from $50 to $500, imprisonment for not more than thirty days, or both (ch. 286, §16). *Without reference to this statute, consent being necessary to the validity of all contracts, the parties to a marriage have to be able to understand its nature (3), and the marriage of an insane person may be avoided by such incompetent or by the other party who married in good faith and ignorance of the insanity (4). Under the statute, however, the purpose of which is to prevent procreation of incompetents, the marriage of a feeble-minded person is only voidable during the lives of the parties (5) but that even though the incompetency was not fraudulently concealed from the other party (6).*

No person reported to the State Board of Health as having gonorrhea or syphilis shall marry until there is returned to said board a satisfactory record by the physician that such person is free from the disease and will not infect others (ch. 286, §17). [Note: Every physician shall keep a record of venereally diseased patients, shall use reasonable means to ascertain their intentions as to marriage, shall warn them of the legal, moral, and physical evils of marriage contracted by them (ch. 286, §18), and if he learns that such a patient intends to marry, he shall notify the State Board of Health (ch. 286, §19).] The town clerk, on being informed by a physician or by any board of health that an applicant has gonorrhea or syphilis,

shall not issue a certificate of intention without the consent of the State Board of Health (ch. 286, §20). *Penalty.* Failure to comply with these provisions as to diseased persons is punishable by imprisonment of from three months to one year, fine of from $200 to $500, or both (ch. 286, §21). *Misrepresentation of chastity may constitute fraud allowing of annulment* (7). [*See* 4d.]

i. Form of License.—The clerk shall deliver to the parties a certificate of intention embodying the facts required in the notice of intention [see ch. 286, §22, under 1k], specifying the time when notice of intention was entered (ch. 286, §23), and shall minute upon such certificate the fact of the granting of special permission for persons under the age of consent to marry and any shortening of the advance notice period [see ch. 286, §§24 and 25, under 1e] (ch. 286, §7).

j. Record of License.—The clerk shall record the notice in a book kept for that purpose (ch. 286, §22), and shall minute upon the record of the certificate of intention issued the fact of the granting of special permission for the marriage of persons under the age of consent and of any shortening of the advance notice period [see ch. 286, §§24 and 25, under 1e] (ch. 286, §7).

k. Other Provisions.—The notice of intention shall state the names, color, occupation, birthplaces, residences, ages, and domestic condition of the persons intending marriage, whether first or other marriage, and the names, residences, color, occupation, and birthplaces of their parents (ch. 286, §22).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by a justice of the peace as commissioned in the state; by any minister within the state, properly ordained, residing in the state, and in regular standing with his denomination, and within his parish by any minister residing outside the state having a pastoral charge wholly or partly in this state (ch. 286, §28); by Jewish rabbis who are citizens of the United States and residents of this state; and by Quakers according to their practice (ch. 286, §34, as amended P.A. 1927, ch. 45).

b. Officiant's Credentials.—The Secretary of State, upon receipt of a fee of $5.00, may issue a special license to an ordained minister—or Jewish rabbi, a citizen of the United States (ch. 286, §34, as amended P.A. 1927, ch. 45)—residing outside the state, authorizing

him in a particular case to marry a couple within the state, which license shall set forth the names and residences of the couple to be married and confer no power to marry others (ch. 286, §29).

c. Presentation of License.—The certificate of intention shall be delivered to the officiant before he shall solemnize the marriage (ch. 286, §23). *Penalty.* Any officiant joining persons in marriage without first having received a certificate of the town clerk shall forfeit for each offense $60 (ch. 286, §31). *The officiant need require of the parties, though they reside in different towns, only one certificate of intention (1). Formerly only a justice or minister could incur the penalty (8).*

d. Form of Ceremony.—[No general provision.] Provisions in this chapter shall not affect the right of Friends or Quakers validly to solemnize marriage in the way usually practiced among them (ch. 286, §34).

e. Common Law Marriage.—No statutory provision. *Though the validity of common law marriages was set forth in a dictum in an early case (9), it has since been established that a formal solemnization is necessary to the validity of marriages in New Hampshire (10). Cohabitation and reputation, though establishing a reasonable inference of actual valid marriage, do not themselves constitute marriage (10).* [As to matrimonial cohabitation, acknowledgment, and reputation creating a conclusive presumption of marriage upon certain conditions, see ch. 286, §36, and decisions under 3d.]

f. Irregular Solemnization.—The validity of a marriage solemnized before a person professing to be a justice or minister shall not be affected by his want of authority, or by any omission or informality in the certificate of intention, if the marriage is otherwise lawful and consummated with the belief of either party thereto that it is lawful (ch. 286, §33). *The official acts of a person not duly qualified as a minister are valid as to third persons and the public when want of qualification is punished by mere penalty (9). Penalty.* Any unauthorized person solemnizing marriage with or without a certificate shall be fined not exceeding $300 (ch. 286, §32).

g. Other Provisions.—No officiant knowing or having reasonable cause to believe that a party is under the age of consent shall solemnize the marriage unless permission therefor has been given (ch. 286, §8). *Penalty.* Any person violating the preceding section, or any person knowingly making any false statement as to the age of a

party with intent to induce the officiant to solemnize the marriage, shall be fined not exceeding $200, imprisoned not exceeding six months, or both (ch. 286, §9). No officiant shall perform a marriage ceremony between persons mentally incompetent (ch. 286, §11). *Penalty.* Any person knowingly violating this provision shall be fined from $50 to $500, imprisoned not exceeding thirty days, or both (ch. 286, §16). [See 1h.] *The officiant need not test the validity of the certificate of intention presented to him: all he need do is see that the certificate is genuine, that it emanates from the clerk of the town where one party is represented as residing, and that it is correct in form (1).* [Note: The persons joined in marriage shall pay the officiant $1.00 (ch. 286, §30).] *Regardless of "Blue Laws" marriages on Sunday are always considered valid (11).*

3. THE MARRIAGE RECORD

a. Marriage Certificates.—Every officiant shall make a record of the marriage and of all facts required and within six days shall forward to the issuer a copy thereof (ch. 285, §5). [As to facts required, see ch. 285, §1, under 5.] *Penalty.* Any person neglecting to perform a duty imposed upon him by this chapter shall be fined not exceeding $50 for each offense for the use of the town, and it shall be the duty of the registrar to enforce this section (ch. 285, §16). Residents of this state going elsewhere to be married and returning to reside, within seven days after their return shall file a declaration of their marriage, including the facts required to be stated in the notice of intention, with the clerk of the town where either of them lived prior to marriage, under penalty of $10 (ch. 286, §27).

b. Local Record.—The clerk of every town shall keep a chronological record of all marriages reported to him (ch. 285, §6), and whenever there is filed with him a certificate of marriage of a non-resident of the town where such marriage is solemnized he shall forward an attested copy of such certificate within ten days to the clerk of the town where each non-resident so married resides (ch. 285, §7). *Penalty.* See ch. 285, §16, under 3a. [Note: Every town clerk shall furnish annually to the selectmen a transcript of his records of marriages during the period prescribed by the Registrar of Vital Statistics for the state, to be published with the town reports (ch. 47, §10).]

c. State Record.—The clerk of every town shall transmit monthly a copy of the record of marriages to the State Registrar of Vital

Statistics, and shall also transmit the names, residences, and official stations of all persons who have neglected to make the returns required by law (ch. 285, §6). *Penalty.* See ch. 285, §16, under 3a. The state registrar shall cause the returns made to him to be arranged and alphabetically indexed and shall include a general abstract thereof in his annual report (ch. 285, §9).

d. Evidence.—A copy of the record of a marriage, certified by the officiant or town clerk, shall be received as evidence of the fact of marriage (ch. 286, §35). *A duly certified copy of a town clerk's record, with proof of the parties' identity, is competent evidence of marriage even in a criminal prosecution (12). A copy of a marriage record authorized by the law of another state to be kept by the officiant and certified by him is admissible (13). A marriage certificate, purported to be signed by the officiant, may be impeached for want of genuineness (14).* In civil actions generally evidence of acknowledgment, cohabitation, and reputation is competent proof of marriage (ch. 286, §37), but in actions as to criminal conversation, adultery, bigamy, and the like, there must be proof of the marriage in fact (ch. 286, §38). Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for three years and until the death of one of them, shall thereafter be deemed to have been legally married (ch. 286, §36). *This statute is not to be interpreted as legalizing a marriage which would be bigamous (15, 16).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (ch. 286, §§1, 2). Every marriage within the prohibited degrees is incestuous and void without legal process and the issue illegitimate (ch. 286, §3; ch. 287, §1). *Under our statute the marriage of cousins is absolutely void and creates no marital interests (17). Penalty.* All persons intermarrying within the prohibited degrees shall be imprisoned not exceeding one year and fined not exceeding $500 or shall be imprisoned not exceeding three years (ch. 386, §§7, 1).

b. Proper Civil and Racial Status.—No provision.

c. Proper Legal Status.—All marriages prohibited by law where either party has a former spouse living, knowing such spouse to be alive, shall be absolutely void without legal process (ch. 287, §1), and any person so marrying or cohabiting with any other person during the life of a spouse shall be imprisoned not exceeding one year and fined not exceeding $500, or shall be imprisoned not exceeding

three years (ch. 386, §§5, 1), punishment not extending to a person whose spouse shall have been absent and not heard from for three years together or reported and generally believed dead, or to a person who has been legally divorced or whose former marriage took place within the age of consent (ch. 386, §6). *A prior subsisting marriage incapacitates one from contracting a later marriage (18), which later marriage is void (15, 16, 19), and a statute exempting one from punishment for polygamy in remarrying after the spouse's absence for a certain period does not validate the later marriage if the spouse is in fact alive (18).*

d. Proper Consent of Parties.—No statutory provision. *A marriage induced by fraud or duress is void ab initio and may be impeached collaterally (20, 21). Fraud sufficient to preclude from assent the party deceived will vitiate the marriage contract (4) if it is material (though not necessarily essential) to the marriage relation, could not have been discovered by the exercise of reasonable prudence, and was not waived by information of it (7). Thus a marriage entered into upon condition of chastity, and misrepresentation thereof, may be annulled (7). But the urging by the town selectmen of a hurried marriage in order to change a pauper's settlement is not such fraud as vitiates the marriage as between the parties (22). Inducement to marry on threat of the sheriff to serve a warrant for bastardy, or of selectmen urging marriage to prevent a bastardy action (22), emanating not from the parties but from third persons, is not such duress as authorizes annulment (21). Voluntary cohabitation by the innocent party after the fraud is known or the duress removed cures the defect and renders the marriage valid (21).*

5. STATE SUPERVISION

The Registrar of Vital Statistics for the state shall furnish to authorized officiants, town clerks, and clerks of the Society of Friends a copy of this chapter and suitable blanks for recording, which shall set forth the date and place of marriage; the name, residence, and official character of the officiant; and the facts required to be stated in the notice of intention (ch. 285, §1). [As to facts required in the notice of intention, see ch. 286, §22, under 1k. As to powers of the State Board of Health over the issuance of marriage licenses to mentally defective or to diseased persons, see ch. 286, §§13, 15, 17, 20, under 1h. As to report to the State Registrar of those failing to make marriage returns, see ch. 285, §6, under 3c. As to Secretary of State granting licenses to non-resident ministers, see ch. 286, §29, under 2b.]

6. INTERSTATE RELATIONS

No statutory provision. *The law of the place of contract governs the validity of marriage when not opposed to religion, morality, or the institutions of the country where it is sought to be applied and when the parties thereto are not incapacitated by the laws of their domicil from making the contract (3).*

7. SEX OFFENSES AND MARRIAGE

The act or state of marriage shall not be a defense to the crime of pandering (ch. 386, §13).

NEW HAMPSHIRE CASES

1. Wood v. Adams, 35 N.H. 32 (1857). **2.** Aldrich v. Bennett, 63 N.H. 415 (1885). **3.** True v. Ranney, 21 N.H. 52 (1850). **4.** Keyes v. Keyes, 22 N.H. 553 (1851). **5.** Lau v. Lau, 81 N.H. 44 (1923). **6.** Schoolcraft v. O'Neil, 81 N.H. 240 (1924). **7.** Gatto v. Gatto, 79 N.H. 177 (1919). **8.** Bishop v. Marshall, 5 N.H. 407 (1831). **9.** Londonderry v. Chester, 2 N.H. 268 (1820). **10.** Dunbarton v. Franklin, 19 N.H. 257 (1848). **11.** George v. George, 47 N.H. 27, 37 (1866). **12.** State v. Wallace, 9 N.H. 515 (1838). **13.** Homans v. Corning, 60 N.H. 418 (1880). **14.** Knight v. Heath, 23 N.H. 410 (1851). **15.** Emerson v. Shaw, 56 N.H. 418 (1876). **16.** Hilliard v. Baldwin, 76 N.H. 142 (1911). **17.** Hayes v. Rollins, 68 N.H. 191 (1894). **18.** Webster v. Webster, 58 N.H. 3 (1876). **19.** Vigno v. Vigno, 79 N.H. 108 (1918). **20.** Farmington v. Somersworth, 44 N.H. 589 (1863). **21.** Hampstead v. Plaistow, 49 N.H. 84 (1869). **22.** Concord v. Goffstown, 2 N.H. 263 (1820).

NEW JERSEY

REFERENCES: Compiled Statutes of New Jersey (five volumes), 1709–1910; Cumulative Supplement (three volumes), 1911–1924; Laws of New Jersey, 1925, 1926, 1927; Reports through 100 Law and 98 Equity.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections as arranged in the Cumulative Supplement—where will be found either the statutory provision itself or a reference to it in the Compiled Statutes—or they refer to the session laws which amend such provisions. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this New Jersey section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—It shall be necessary for persons intending to be married within the state first to obtain a marriage license before the proposed marriage can be lawfully performed (123–21), but nothing in this act shall render any common law or other marriage, otherwise lawful, invalid for failure to take out a license as herein provided (123–30). *A license is not essential to the validity of a marriage* (*1*, *2*).

b. Issuer.—Licenses shall be issued in first class cities by the city clerk (123–23, as amended L. 1926, ch. 202; 123–38), elsewhere by the registrar of vital statistics, or if there be no such registrar, by the clerk of the municipality or assessor of taxes of the township (123–22), and by deputies designated by such officials in their absence (123–24). If the female party is a resident of the state, the license shall be issued in the municipality in which she resides, or in the township where either party resides in case both parties reside in a township in the state; if she is a non-resident of the state, in the municipality in which the male party resides; if both parties are non-residents of the state, in the municipality or township in which the marriage is to be performed (123–21).

c. Compensation of Issuer.—For a marriage license the issuer shall receive from the applicant $2.00 (123–23, as amended L. 1926,

ch. 202). In cities of the first class fees for licenses issued by the city clerk shall be paid into the city treasury (123–23, as amended L. 1926, ch. 202; 123–38). The governing body of every municipality shall have the power to fix by ordinance the amount of salary and compensation to be paid each officer, except such as are determined by referendum vote (*136–1301). *In places other than cities of the first class, in the absence of a special provision the issuer may retain fees for marriage licenses regardless of salary (3).*

d. Personal Appearance by Candidates.—The issuer is empowered to issue licenses to contracting parties who apply therefor (123–22) and before issuance shall require them to appear and swear to the truth of the facts respecting the legality of the proposed marriage (123–23, as amended L. 1926, ch. 202).

e. Advance Notice and Objections.—No license shall be issued until a period of forty-eight hours has elapsed after application therefor (123–23, as amended L. 1926, ch. 202). *Penalty.* See 123–23 under 1k. [Note: The license must also be obtained at least twenty-four hours prior to the solemnization (123–21), except in cases of arrest upon a criminal charge involving accusation of bastardy, rape, fornication, or carnal knowledge, where the accused consents to marry the female, in which case such marriage may be performed immediately upon procuring a license (123–39).]

f. Minimum Age.—[No statutory provision as condition to license issuance. In absence thereof the common law ages govern issuance in practice. See Introduction, page 9.—G. M.] Marriages of males under eighteen and females under sixteen years may be declared null on the suit of the nonaged party if not confirmed by cohabitation after arriving at such age (62–1). *In order to avoid trial marriages annulment will be granted only upon strict proof of age (4). The purpose of the statute, which is not retroactive and does not affect marriages contracted previous to its enactment (5), is to raise the common law ages for annulment from fourteen and twelve years to eighteen and sixteen (6). Inasmuch as the law allows the nonaged party to confirm the marriage after arrival at the established age and to make it indissoluble (7), action will lie only after such party has attained that age, for there should be an opportunity to make the decision upon reaching maturity (6). Cohabitation and sexual intercourse after attaining the prescribed age constitute an act of confirmation precluding later repudiation (8). The annulment act being general, the giving of parental consent to the marriage of a person under age does not bar action (1), and conversely a parent who has not consented may not main-*

tain the action, which right is personal to the spouses themselves (9). Misrepresentation by a minor of his age is equitable ground to deny his plea for annulment (2). Regardless of where the marriage was contracted it can be annulled in this state only if the petitioner is domiciled here (8, 10, 11, 12).

g. Parental Consent.—License for the marriage of a male applicant under twenty-one or a female under eighteen years shall not be issued until the parents or guardians of the minor, if there be any, first certify to the issuer in writing under seal in the presence of two reputable witnesses their consent thereto, unless the parents or guardian be of unsound mind, or unless the male applicant shall have been arrested on a charge of intercourse with a female of good repute by which she has become pregnant, in which case the consent of the parents of neither party is necessary (123–26). *In the absence of a statute expressly so declaring, parental consent is not necessary to the validity of the marriage of a minor (7, 9), and the requirement of parental consent for license issuance does not allow a parent to affirm or disaffirm the marriage of a minor or apply for annulment (1). Parental consent must be given in the manner prescribed by statute (13). The statute in an earlier form used to demand parental consent even in marriages to avoid prosecution for seduction (14). Penalty.* See 123–23 under 1k. [Note: Any person taking an unmarried female under eighteen years from the possession and against the will of her parent or guardian, though with her consent, with intent to contract marriage with her, shall be guilty of a misdemeanor—punishable by fine not exceeding $1000, imprisonment not exceeding three years, or both (52–218)—and if he contract marriage with her without parental consent he shall be guilty of a high misdemeanor—punishable by fine not exceeding $2000, imprisonment not exceeding seven years, or both (52–217)—and every such marriage shall be void (52–117). *The statute is unconstitutional, in so far as it renders the marriage void, as embracing more than one subject; the statute is penal and the provision as to nullity, affecting both parties equally, is not penal (9, 15).*]

h. Mental and Physical Qualifications.—No license to marry shall be issued when either of the contracting parties at the time of application is infected with gonorrhea, syphilis, or chancroid in a communicable state or is under the influence of intoxicating liquor or a narcotic drug or is imbecile, epileptic, or of unsound mind, or when either is or has been an inmate of an insane asylum or institution for indigent persons unless it appears that he has been satisfactorily discharged therefrom (123–21). *Penalties.* [See 123–23

under 1k.] Any person marrying with knowledge that he is infected with venereal disease is guilty of a misdemeanor (52–50a), punishable by fine not exceeding $1000, imprisonment not exceeding three years, or both (52–218).

A marriage may be decreed null when the parties or either of them shall have been incapable at the time of consenting thereto (62–1). [See 4d.] *Insanity or mental impairment rendering a person incapable at the time of giving actual consent to the formal marriage contract allows of annulment notwithstanding consummation (16, 17). To contract marriage a person must have sufficient mental ability to understand its nature and effect, but no more than is necessary to make a business contract or will (18). Though concealment of an unjustified belief in one's own insanity is not proof of insanity (19) and even the finding of a lunacy commission is not conclusive proof of mental incapability (18), recent and soon subsequent affliction with dementia praecox, a progressive and usually incurable disease, does establish an incapacitating mental condition (20). Concealment of mental afflictions, of physical impotence, of venereal disease—though the mere existence thereof is not ground for annulment (21)—or of antenuptial pregnancy, may constitute fraud allowing of annulment.* [*See* 4d.]

i. Form of License.—The license authorizes the marriage of the parties whose names and residences are given, provided that the officiant knows no lawful impediment thereto, and contains on the reverse side a form for the certificate which the officiant shall fill out and sign and which at least two witnesses shall sign with their residences. [See 3a.] If the parties desire both a civil and religious ceremony the license shall be issued in duplicate, the purpose of each being designated (123–22).

j. Record of License.—No statutory provision. [The blank form issued by the State Bureau of Vital Statistics contains a stub on which the issuer is to record the time and place of issuance of license and the names and addresses of the parties. See 123–34 under 5.—G.M.]

k. Other Provisions.—The issuer shall require the parties to swear to facts as to the legality of the proposed marriage, which testimony shall be verified by a witness of legal age, residing in the municipality in which the license is issued, and shall issue the license only if it shall appear that no legal impediment to the marriage exists (123–23, as amended L. 1926, ch. 202). No marriage license shall be issued to any person who is or has been an inmate of any institution

for indigent persons unless it appears that he has been satisfactorily discharged therefrom (123–21). Every issuer is empowered to administer oaths to the applicants and the identifying witness or witnesses (123–27). Licenses shall be valid only for thirty days after the date of issuance (123–22). *Penalties.* Any assessor, registrar, or clerk issuing a license except as provided shall be guilty of a misdemeanor (123–23, as amended L. 1923, ch. 202), punishable by fine not exceeding $1000, imprisonment not exceeding three years, or both (52–218). Any applicant knowingly making a false answer under oath to any of the issuer's inquiries is guilty of perjury (123–27) punishable by fine not exceeding $2000, imprisonment not exceeding seven years, or both (52–18; 52–217).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by all justices of the supreme court, the chancellor and each vice-chancellor, each judge of a court of common pleas, recorder, police justice, and mayor of this state, by every ordained minister, by every religious society according to its customs, and by judges of the criminal judicial district courts in counties where such courts may exist (123–20, as amended L. 1927, ch. 309). *Ministers and justices are simply desirable persons, from gravity and respectability, to certify the record of marriage, and a marriage solemnized by an unauthorized person is nevertheless valid (22).* [Note: All marriages performed prior to 1912 by a minister other than a stated and ordained minister of the gospel, if otherwise valid, are valid as if the same had been performed by a stated and ordained minister (123–37). *Present agreement to become, and cohabitation as, husband and wife constituted marriage regardless of whether the officiating minister was "stated" (23).*]

b. Officiant's Credentials.—No provision.

c. Presentation of License.—Before the proposed marriage can be lawfully performed it shall be necessary to deliver a marriage license to the officiant or to the society wherein the marriage is to be celebrated (123–21). *Penalty.* Any authorized person or society performing a ceremony without the presentation of a license therefor is punishable by imprisonment not exceeding six months, fine not exceeding $500, or both (123–28).

d. Form of Ceremony.—The certificate of marriage shall contain the signature of at least two witnesses present at the marriage

(123–22). Every religious society may join in marriage a member or members of such society according to its customs (123–20, as amended L. 1927, ch. 309).

e. Common Law Marriage.—Nothing in this act shall render any common law or other marriage, otherwise lawful, invalid by reason of failure to take out a license as provided (123–30). *A contract between capable parties to take each other as husband and wife* per verba de praesenti *amounts to an actual marriage from that instant (22, 23, 24, 25, 26, 27, 28, 29). Though a contract consented to by both parties is necessary (30), it need be in no particular form of words (28), and where the intention appears to be matrimonial with no indication of illicitness (25, 28, 31), cohabitation and reputation, though not themselves constituting marriage, may raise the presumption of marriage notwithstanding want of ceremony (25, 28, 32, 33). To establish the presumption both cohabitation and reputation as husband and wife are essential (34).*

In case of cohabitation continued after removal of an impediment to the marriage: (a) if the parties originally intended marriage, being ignorant of their disability, the continued cohabitation constitutes a carrying into effect of the original purpose and the formation of a common law marriage (35, 36, 37, 38, 25 dictum, 39 dictum); (b) if both parties knew of the impediment, the adulterous intent in cohabitation is presumed to continue even after removal of the impediment (25, 27 dictum, 39 dictum); (c) if one party knew of the impediment and the other acted innocently and in good faith, continued cohabitation after removal of the impediment estops the former to deny the marriage (25 as interpreted by 39). Even where both parties knew of the impediment, an actual contract of marriage after its removal may be proved (27, 40, 41). The burden of proving a continuance of matrimonial intent in the later cohabitation is on the proponent of the valid marriage (34, 35).

f. Irregular Solemnization.—No provision.

g. Other Provisions.—Authorized officiants are empowered to administer oaths to the parties and to require them to make true answers to any inquiries in order to ascertain whether any impediment to the proposed marriage exists (123–28). *Penalty.* Any person wilfully making false answer to such inquiries is guilty of perjury, provided such answer is reduced to writing signed by the party making it and attached to the marriage certificate (123–28). [As to penalty for perjury, see 52–18 and 52–217 under 1k.]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant shall sign a certificate of marriage setting forth the name, age, parentage, color, birthplace, occupation, residence, and domestic condition of the parties, the names and country of birth of the parents of each, and the date and place of marriage (123–22) and shall transmit such certificate and license, within five days after the ceremony, to the local registrar of vital statistics or, if there be none, to the clerk of such municipality where the marriage occurs or to the clerk of the county board of health, or in townships to the registrar of vital statistics or assessor of the township or, if there be none, then to the township clerk (123–31). *Penalties.* Any officiant or witnessing clerk[1] failing to transmit such certificate and license to the designated officer within the proper time shall be liable to a penalty of $50 (123–31), and such person making any false certificate of marriage shall be liable to a penalty of $100 (123–29). [Note: Local and county boards of health have power to make ordinances to compel the return of all marriages by officiants and impose penalties for failure (89–12; 89–112).]

b. Local Record.—[The blank form issued by the State Bureau of Vital Statistics provides on a stub retained by the license issuer a space for recording the date of filing the marriage certificate and also a stub to be retained by the officiant showing details of the ceremony. See 123–34 under 5.—G.M.] The clerk, registrar, or assessor receiving the certificate of a marriage within his district shall make a duplicate of the certificate, when the license was issued in another municipality, and shall transmit it within twenty-four hours after receipt of the original to the officer legally designated to receive such certificates in the municipality in which the license issued (123–40) and shall stamp each certificate received with the date and name of the municipality in which it is filed (123–41), every duplicate being filed in the office of the person to whom it is sent in the same manner as though the marriage had taken place in his municipality (123–42). *Penalties.* Every clerk, registrar, or assessor failing to forward any duplicate certificate as provided shall be liable to a penalty of $50 recoverable in an action of debt (123–43). Any public officer wilfully failing to perform any duty imposed on him by law within the time required shall be guilty of a misdemeanor (52–23), punishable by fine not exceeding $1000, imprisonment not exceeding three years, or both (52–218).

[1] See Introduction, p. 24.

c. State Record.—Each registrar, assessor, or clerk shall transmit monthly to the State Bureau of Vital Statistics all certificates of marriages, licenses, and consents to the marriage of minors received by him (123–32). *Penalty.* Failure to transmit all such certificates monthly is punishable by a penalty of $50 (123–32). The medical superintendent of the State Bureau of Vital Statistics shall cause the licenses and certificates received to be recorded, alphabetically indexed, and tabulated so as to present in separate classes the record of each municipality, which tabulation shall be a public record (123–33). [Note: When a marriage shall have been declared void by the court of chancery the chancellor may order the record thereof in the State Bureau of Vital Statistics to be cancelled (123–45).]

d. Evidence.—Any original certificate of marriage or marriage license and consent, or copy thereof certified by the medical superintendent of the State Board of Health, shall be evidence in any court of the facts therein contained (123–33). All transcripts of returns of marriages by any officiant or transcripts of the records of the officer receiving them shall be received as legal evidence (70–28), if properly certified (70–29). *Though the marriage register may be the best evidence, parol proof of marriage is admissible (42).* Any public record of a foreign state or country, or copy thereof, admissible in a court therein and exemplified according to the acts of Congress, shall be admitted in evidence (70–27). *Certified copies of marriage records of another state may be admitted (43) if the law of that state requires such recording of marriages (44) and the instrument shows the capacity of the person signing as legal custodian of the records (41, 44). A copy of a parish record of a foreign country, kept in pursuance of law, is admissible only if certified by the custodian thereof and authenticated by the United States representative in that country (41).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. A marriage within the prohibited degrees is absolutely void (123–19). A marriage may be decreed null during the lifetime of the parties if contracted within the prohibited degrees, but after the death of either party its validity shall not be inquired into (62–1). *Before the enactment as to absolute nullity consanguineous marriages were held voidable only in a direct proceeding instituted for that purpose and not subject to collateral attack (45).* *Penalty.* Any person marrying within the degrees prohibited shall be punished by fine not exceeding $1000, imprisonment not exceeding five years, or both (52–45).

b. Proper Civil and Racial Status.—No provision. [See 123–21 under 1k.]

c. Proper Legal Status.—*The marriage of a person already married is void (25, 28, 43, 46, 47, 48) and creates in the innocent party no incapacity to marry another (43).* A marriage may be declared null when either party has a spouse living at the time of the later marriage (62–1). *The statute provides an equitable action to which the doctrine of "clean hands" applies and bars relief in cases of the petitioner's own fraud (36, 41, 44, 47, 49, 50), if he had positive knowledge of the prior marriage and acted in bad faith (50), deceiving the other (47). And though the bill for annulment need not itself allege good faith (49), the burden is on the petitioner to show ignorance of the spouse's prior subsisting marriage and innocence of intention to violate the law (37, 51). [Note: The innocent party may have a tort action for fraud against the person inducing a void marriage when married to another (50, 52).]* Any person having a spouse living who marries another shall be punished by fine not exceeding $1000, imprisonment not exceeding ten years, or both, unless the spouse for five years together shall be continually remaining without the United States or shall absent himself for such period, the one marrying not knowing him to be living within that time, or unless the former marriage has been declared void or the parties divorced (52–52). *A prior common law marriage supports a prosecution for bigamy (33).*

A decree nisi of divorce shall become absolute three months after entry thereof unless appealed from (62–21, as amended L. 1927, ch. 60). *There is a presumption in favor of the legality of a later ceremonial marriage followed by cohabitation (41, 53).*

d. Proper Consent of Parties.—*Mere words without intent to contract, as in case of a jest, do not create a marriage (54, 55). But if the acts and words of a person, followed by matrimonial cohabitation and repute, amount to a statement that the other party is his spouse, no mental reservation or secret intention can deprive such other person of matrimonial rights (28).* A marriage may be decreed null when the parties or either of them shall have been at the time of the marriage incapable of consenting thereto and the marriage was not subsequently ratified, except where the capable party, being the applicant, at the time of marriage had knowledge of the other's incapacity or, subsequent to the other's regaining capacity, confirmed the marriage (62–1). *A consummated marriage may be annulled only for fraud going to the common law essentials of the marriage contract; an unconsummated marriage, not having created a change of status, may be*

annulled for any fraud whatsoever at the option of the injured party (48). Antenuptial pregnancy of the wife, unknown to the husband who is himself innocent of relations with her, is fraud going to the essence (56, 57, 58 dictum) but does not allow of annulment if the husband has knowledge to put him on guard against the contingency of existing pregnancy, as where he knows of her relations with him (58, 59, 56 dictum) or with other men (60). But where the woman knew herself pregnant by one man and induced another to have sexual intercourse with her so as to be able to blame her condition on him, quaere (61). Mere premarital incontinence, unknown to the other party, is not ground for annulment (56 dictum) nor is misrepresentation that one actually married and divorced beforehand has never been married, regardless of the religious belief of the other party that marriage with a divorced person is sin (62). Though fraud concerning freedom from disease generally, even if transmissible, does not go to the essence of marriage (63), misrepresentation or fraudulent concealment of certain diseases existing at the time of marriage, which make important matrimonial functions impossible, such as syphilis (21, 63), hereditary chronic tuberculosis (64), or epilepsy (65), allows of annulment. So too, fraudulent concealment of sterility or impotency (66, 67). Not so, however, concealment of hereditary insanity if not transmissible and not incapacitating (19). But quære (64). Other elements going to the essence are a secret determination before marriage not to engage in sexual relations with the spouse after marriage and carrying such intention into effect (68) or misrepresentation of age where the actual age would allow of annulment for nonage and make the relation only a trial marriage (2). If the marriage is unconsummated, annulment is granted for any fraud whatsoever which would render a contract voidable, such as a breach of trust (69) or a misrepresentation of character, profession, and social standing (70)—though not merely of wordly possessions (71).

Duress allowing of annulment must be that degree of constraint or danger sufficient to overcome the mind of an ordinary person (72). The degree varies according to circumstances (73) but must dominate the action at the time (72). A legal arrest does not itself constitute duress (74), and one marrying to escape prosecution for bastardy (74), seduction (75, 76), or attempted abortion (77) cannot evade the obligations of marriage by annulment even though elements of the crime were in fact lacking, excessive bail was demanded (75), or the term of punishment was exaggerated, unless the charge was made falsely and maliciously (76). Penalty. Any person unlawfully taking a woman contrary to her will and causing her marriage to himself or to another, either with or without her consent, shall be punished by fine not exceeding

$1000, imprisonment not exceeding twelve years, or both, and every such marriage shall be void (52–116). [Note: Any person taking a female against her will with intent to compel her marriage shall be guilty of a high misdemeanor (52–47a), punishable by fine not exceeding $2000, imprisonment not exceeding seven years, or both (52–217).] *Long cohabitation and acceptance of the marriage relation may constitute ratification of a voidable marriage (78, 79).*

5. STATE SUPERVISION

The State Bureau of Vital Statistics shall cause to be issued to license issuers the form and substance of the several inquiries to be made of any applicant for license and the witness (123–25) and shall cause to be prepared blank forms of certificates of marriage and licenses corresponding to the requirements of this act concerning marriages, which forms shall be distributed to issuers together with instructions and explanations (123–34). All appointments of local registrars of vital statistics are subject to the approval of the State Department of Health (22–19c, 4).

6. INTERSTATE RELATIONS

No statutory provision. *The validity of marriage is governed by the law of the place of contract (26, 68): a marriage illegal and void where contracted is void in this state (41), and a marriage valid where contracted is valid everywhere, even if residents of one state go elsewhere to have a marriage solemnized in evasion of the law of their domicil and return immediately (80). The validity of a marriage at sea is governed by the law of the vessel's flag or ownership (68).*

7. SEX OFFENSES AND MARRIAGE

After seduction which has caused pregnancy and before sentence the defendant's marriage with the woman allows of suspension of sentence, and after sentence of discharge from further imprisonment (52–50). [See 123–39 under 1e.] *The general statutory requirements for marriage must be complied with in cases of marriage to avoid prosecution for seduction as in other cases, even though that makes it more difficult for certain persons to marry (14).*

NEW JERSEY CASES

1. Taub v. Taub, 87 E. 624 (1917). **2.** Gibbs v. Gibbs, 92 E. 542 (1921). **3.** City of Paterson v. Gall, 87 L. 189 (1915). **4.** Titsworth

v. Titsworth, 78 E. 47 (1910). **5.** Williams v. Brokaw, 74 E. 561 (1908). **6.** Palmer v. Palmer, 80 Atl. 486 (1911); 79 E. 496 (1912). **7.** Fodor v. Kunie, 92 E. 301 (1920). **8.** Jimenez v. Jimenez, 93 E. 257 (1922). **9.** Niland v. Niland, 96 E. 438 (1924). **10.** Hess v. Kimble, 79 E. 454 (1911). **11.** Rinaldi v. Rinaldi, 94 E. 14 (1922). **12.** Pennello v. Pennello, 97 E. 421 (1925). **13.** Wyckoff v. Boggs, 7 L. 138 (1824). **14.** Craft v. Jachetti, 47 L. 205 (1885). **15.** Robbins v. Lanning, 93 E. 262 (1922). **16.** Brainen v. Brainen, 79 E. 270 (1912). **17.** Daniele v. Margulies, 95 E. 9 (1923). **18.** Kern v. Kern, 51 E. 574 (1893). **19.** Allen v. Allen, 85 E. 55 (1915); 86 E. 441 (1916). **20.** Buffum v. Buffum, 86 E. 119 (1916).

21. Kaufman v. Kaufman, 86 E. 132 (1916). **22.** Pearson v. Howey, 11 L. 12 (1829). **23.** Ross v. Sparks, 81 E. 117 (1912); 81 E. 211 (1913). **24.** Applegate v. Applegate, 45 E. 116 (1889). **25.** Voorhees v. Voorhees [Collins v. Voorhees], 46 E. 411 (1890); 47 E. 555 (1890); 47 E. 315 (1890). **26.** Clark v. Clark, 52 E. 650 (1894). **27.** Atlantic City R.R. Co. v. Goodin, 62 L. 394 (1898). **28.** Jackson v. Jackson, 94 E. 233 (1922); affirmed, 118 Atl. 926. **29.** Travers v. Reinhardt, 25 App. D.C. 567 (1905). **30.** Goldbeck v. Goldbeck, 18 E. 42 (1866). **31.** Bey v. Bey, 83 E. 239 (1914). **32.** Stevens v. Stevens, 56 E. 488 (1898). **33.** State v. Thompson, 76 L. 197 (1908). **34.** Maxwell v. Maxwell, 98 E. 493 (1925). **35.** Robinson v. Robinson, 82 E. 466 (1913); 83 E. 150 (1914); 84 E. 201 (1915). **36.** Dolan v. Wagner, 95 E. 1 (1923); 96 E. 298 (1924). **37.** Fromm v. Huhn, 95 E. 728 (1924). **38.** In re Graham, 46 Atl. 224 (1899). **39.** Chamberlain v. Chamberlain, 68 E. 414 (1905); 68 E. 736 (1905). **40.** Mick v. Mart, 65 Atl. 851 (1907).

41. Schaffer v. Krestovnikow [also Schaffer], 88 E. 192 (1917); 88 E. 523 (1918); 89 E. 549 (1918). **42.** Albertson v. Smyth, 3 L. *473 (1809). **43.** Dare v. Dare, 52 E. 195 (1893). **44.** Rooney v. Rooney, 54 E. 231 (1896). **45.** Boylan v. Deinzer, 45 E. 485 (1889). **46.** Lindsay v. Lindsay, 42 E. 150 (1886). **47.** Davis v. Green, 91 E. 17 (1919). **48.** Ysern v. Horter, 91 E. 189 (1920); 94 E. 135 (1922). **49.** Harned v. Harned, 73 E. 244 (1907). **50.** Freda v. Bergman, 77 E. 46 (1910). **51.** Tyll v. Keller, 94 E. 426 (1923). **52.** Knott v. Knott, 51 Atl. 15 (1902). **53.** Sparks v. Ross, 72 E. 762 (1907); 73 E. 735 (1908); 74 E. 621 (1908); 75 E. 550 (1909); 79 E. 99 (1911). **54.** McClurg v. Terry, 21 E. 225 (1870). **55.** Girvan v. Griffin, 91 E. 141 (1919). **56.** Carris v. Carris, 24 E. 516 (1873). **57.** Sinclair v. Sinclair, 57 E. 222 (1898). **58.** Seilheimer v. Seilheimer, 40 E. 412 (1885). **59.** States v. States, 37 E. 195 (1883). **60.** Clickner v. Clickner, 95 E. 479 (1924).

61. Trimpe v. Trimpe, 65 Atl. 744 (1907). **62.** Boehs v. Hanger, 69 E. 10 (1905). **63.** Crane v. Crane, 62 E. 21 (1901). **64.** Davis v. Davis, 90 E. 158 (1919). **65.** Gruber v. Gruber, 98 E. 1 (1925). **66.** Turney v. Avery, 92 E. 473 (1921). **67.** Steerman v. Snow, 94 E. 9 (1922). **68.** Bolmer v. Edsall, 90 E. 299 (1919). **69.** Cox v. Cox, 110 Atl. 924 (1909). **70.** Dooley v. Dooley, 93 E. 22 (1921). **71.** Woodward v. Heichelbech, 97 E. 253 (1925). **72.** Capossa v. Colonna, 95 E. 35 (1923); 96 E. 385 (1924). **73.** Avakian v. Avakian, 69 E. 89 (1905). **74.** Sickles v. Carson, 26 E. 440 (1875). **75.** Seyer v. Seyer, 37 E. 210 (1883). **76.** Ingle v. Ingle, 38 Atl. 953 (1897). **77.** Frost v. Frost, 42 E. 55 (1886). **78.** G—— v. G——, 67 E. 30 (1904). **79.** Kirschbaum v. Kirschbaum, 92 E. 7 (1920). **80.** Smith v. Smith, 52 L. 207 (1889).

NEW MEXICO

REFERENCES: New Mexico Statutes, 1915; Laws of New Mexico, 1915, 1917, 1919, 1920 (special session), 1921, 1923, 1925, 1927; Reports through Volume 30.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Statutes of 1915 and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this New Mexico section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—All persons desiring to enter into the marriage relation shall obtain a license (3435).

b. Issuer.—License is obtained from the county clerk in the county wherein the marriage is to occur (3435). Whenever the parties reside more than 10 miles from the county seat, they may make application for license to any person authorized to perform marriages or to administer oaths, who shall interrogate them as prescribed by law and certify the result to the county clerk in writing without expense to the applicants; and upon satisfactory proof that the parties are legally qualified to marry the county clerk shall issue a license (3436, as amended L. 1915, ch. 31). [Note: All marriages celebrated in the territory during the year 1905, the parties not having obtained a license from the probate clerk but the marriages being valid according to the law prior to 1905, are hereby validated (3444).]

c. Compensation of Issuer.—For issuing license, recording, and indexing, the county clerk shall receive $1.00 (3440), which fees he pays over monthly to the county treasurer (L. 1915, ch. 12, §8), county officers receiving fixed annual salaries (L. 1915, ch. 12, §2).

d. Personal Appearance by Candidates.—No provision. [As to application for license made to persons authorized to perform marriages or to administer oaths, see 3436 under 1b.]

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—[No provision as condition to license issuance.] No person shall knowingly unite in marriage any male under eighteen or female under sixteen years (3431, as amended L. 1923, ch. 100), and the district court may declare void a marriage of an infant under the prohibited age on suit of such infant, his parent or guardian, or the district attorney, unless there be cohabitation until arrival at such age, in which case the marriage shall be deemed binding (3434, as amended L. 1927, ch. 110).

g. Parental Consent.—No male under twenty-one or female under eighteen years can marry unless he or she obtain the consent of his or her parents or guardian, given in person or certified in writing authenticated before a competent authority (3427, as amended L. 1923, ch. 100). [The form of license in §3442 provides for the signature of the parent or guardian with no place for authentication. See li.] *Penalty.* If any person prohibited from contracting marriage by the foregoing sections shall violate the provisions thereof, he shall be fined not less than $50 (3432). [As to penalty on officiant see 3431 and 3432 under 2g.] [Note: As to abduction of female under fourteen without parental consent for purpose of marriage, see 1497 under 4d.]

h. Mental and Physical Qualifications.—[No statutory provision as condition to license issuance.] Divorce may be granted when the wife at the time of marriage was, unknown to the husband, pregnant by another man (2773).

i. Form of License.—The application for a marriage license shall contain the names, ages, place and date of birth, and residences of the parties, a statement that they are not within the forbidden degrees of relationship, are not now married, and no legal impediment exists; there is then a form for parental consent, then the marriage license authorizing the marriage of the parties whose names and addresses are given, and finally the certificate of celebration to be signed by the officiant, the parties, and two witnesses (3441; 3442).

j. Record of License.—The form of marriage license contains a statement by the county clerk of when and where in the record book he has recorded the license (3442).

k. Other Provisions.—*Penalty.* Any county clerk failing to comply with the provisions of the eight preceding sections and any person wilfully violating the law by deceiving or attempting to mislead any officer in order to obtain a marriage license contrary to law

shall be punished by fine of from $50 to $100, imprisonment of from ten to sixty days, or both (3443).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by any ordained clergyman whatsoever without regard to sect, by any civil magistrate (3426), or by any religious society according to its customs (3428).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—Authorized officiants shall require the parties to produce a license signed and sealed by the county clerk authorizing their marriage (3437). *Penalty.* See 3443 under 2g.

d. Form of Ceremony.—The form of marriage certificate contains blanks for the signature of two witnesses (3442). Any religious society may celebrate marriage according to its rites (3428).

e. Common Law Marriage.—No statutory provision.

f. Irregular Solemnization.—No provision.

g. Other Provisions.—Nothing in this chapter shall excuse any person from exercising the same care as is now legally required in satisfying himself as to the legal qualifications of the parties desiring him to perform the marriage ceremony, in addition to the authority conferred by the license (3437). No authorized officiant shall knowingly unite in marriage any male under twenty-one or female under eighteen years without the consent of their parents or guardians, or any male under eighteen or female under sixteen years with or without the consent of their parents or guardian (3431, as amended L. 1923, ch. 100). *Penalties.* Any person prohibited from contracting marriage by the foregoing sections who shall violate the provisions thereof, and any authorized officiant who shall unite in wedlock any of the persons whose marriage is declared invalid thereby, shall be fined not less than $50 (3432). *When §3431, before being amended, declared marriages under eighteen years for males and fifteen for females "invalid," an officiant thereof was liable to penalty (1).* [Since the rewording of §3431 and failure to reword §3432, quaere.—G.M.] Any authorized officiant failing to comply with the provisions of the eight preceding sections, and any person wilfully violating the law by deceiving or attempting to mislead any such officiant in order to be married contrary to law shall be punished by fine of from $50 to $100, imprisonment of from ten to sixty days, or both (3443).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—All persons performing the marriage ceremony shall certify the marriage to the county clerk within ninety days thereafter (3438). The secretary of a society solemnizing marriage according to its rites, or person presiding, shall transmit a transcript to the probate court certifying to the marriages solemnized (3428). *Penalty.* See 3443 under 2g.

b. Local Record.—The county clerk immediately upon receipt of the certificate shall cause it to be properly recorded and indexed (3438). *Penalty.* See 3443 under 1k. [Note: Nothing in this chapter shall interfere with the records kept by any civil magistrate or church organization or with any additional requirement prescribed by them (3439).]

c. State Record.—No provision. [Note: L. 1919, ch. 85, §17, required officiants and county clerks to make reports on marriages to the State Board of Health. When this provision was omitted, by amendment, in L. 1921, ch. 145, §9, the purpose was quite clearly to repeal the requirement. The fact that a general provision of the same act, L. 1921, ch. 145, §3, transferring all powers of the State Board of Health to the State Board of Public Welfare, retained mention of the collection and tabulation of marriage reports seems to have been merely an oversight.—G.M.]

d. Evidence.—Church records of marriage, more than thirty years old and properly kept, are prima facie evidence of the facts shown (2186).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Marriages within the prohibited degrees are incestuous and absolutely void (3430). The district court may declare void a marriage between relatives (3434, as amended L. 1927, ch. 110). *Penalty.* Persons intermarrying within the prohibited degrees shall be imprisoned not exceeding fifty years (L. 1917, ch. 50), or shall be imprisoned not more than one year or fined not less than $50 (3433).

b. Proper Civil and Racial Status.—No provision.

c. Proper Legal Status.—Every person convicted of bigamy shall be imprisoned for from two to seven years (1775). *Bigamy means having two or more spouses at the same time, and good faith or honest*

belief in the death of the spouse is no defense unless the presumption of death has arisen through the necessary length of absence (2).

d. Proper Consent of Parties.—Marriage is a civil contract for which the consent of parties capable in law of contracting is essential (3425). *Penalties.* Any person compelling a woman against her will to marry him or any other person is punishable by imprisonment of from three to ten years, fine of not less than $1000, or both (1496), and any person taking a female under fourteen years without the consent of her parent or guardian for the purpose of marriage or taking a female unlawfully against her will with intent to compel her marriage is punishable by imprisonment not exceeding five years, fine of not less than $1000, or both (1497).

5. STATE SUPERVISION

No provision.

6. INTERSTATE RELATIONS

Marriages valid where contracted are valid in this state (3429).

7. SEX OFFENSES AND MARRIAGE

Any persons found publicly living together as if married shall be required immediately to join in marriage if there be no impediment, and if they do not so marry and persist in their accustomed mode of life they shall be fined from $25 to $80 for each time they shall be found so (1776).

NEW MEXICO CASES

1. Territory v. Harwood, 15 N.M. 424 (1910). **2.** State v. Lindsey, 26 N.M. 527 (1921).

NEW YORK

REFERENCES: Cahill's Consolidated Laws of New York, 1923; Supplement, 1926; New York Civil Practice Act (Cahill), 1927; Greater New York Charter (Ash), 1925; Laws of New York, 1927; Reports through Volume 244 New York, 218 Appellate Division, 127 Miscellaneous.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to chapter and section of the Consolidated Laws, unless the Supplement thereto or the Civil Practice Act or the New York Charter is specifically cited, and to session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this New York section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—It shall be necessary for all persons intending to be married to obtain a license and deliver it to the officiant before the marriage can be performed (ch. 14, §13). The requirement for obtaining license shall apply to all persons who solemnize their marriage by means of a written contract [see 2e], but shall not be construed to render void for failure to procure a license any marriage solemnized between persons of full age or with a minor under the age of consent—eighteen years—where parental consent has been given (ch. 14, §§7, 25).

b. Issuer.—The clerk of each town or city is empowered to issue marriage licenses to competent parties (ch. 14, §14). Persons obtain licenses from such clerk of the town or city in which the woman to be married resides if a resident of the state; if not, where the marriage is to be performed; or if a resident of an island located more than 25 miles from the office (not on the island) of the clerk of the town of which such island is a part, license may be obtained from a justice of the peace residing on such island, who in that respect is subject to the provisions governing town clerks (ch. 14, §13).

c. Compensation of Issuer.—Before issuing any license the town or city clerk shall be entitled to a fee of $2.00, $1.00 of which he shall transmit monthly to the county clerk of the county in which such town or city is situated, who shall retain the same for his own use unless his office be salaried, and in any city the other dollar of which shall be paid monthly into the city treasury (ch. 14, §15, as amended L. 1927, ch. 547). Officers of cities receive no compensation other than their salaries (ch. 54, §17). Town clerks in some towns are paid a *per diem* compensation or a salary (ch. 63, §§85, 86, and Sup.); in others compensation is by fees only (ch. 63, §87).

d. Personal Appearance by Candidates.—Upon application for a marriage license the town or city clerk shall require each of the contracting parties to sign and verify a statement before such clerk or one of his deputies (ch. 14, §15, as amended L. 1927, ch. 547).

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—Any marriage in which the man is under sixteen years or the woman under fourteen is prohibited (L. 1928, ch. 43). *Penalty.* Any town or city clerk who shall knowingly issue a marriage license to a man or a woman actually under the respective ages of sixteen or fourteen shall be fined $100 for each offense (L. 1928, ch. 43). [As to proof of age see ch. 14, §15, under 1g. As to penalty for solemnizing marriage of persons below the age of legal consent, see ch. 41, §1450, under 2g.] The marriage of a person under eighteen years may be void from the time its nullity is declared by decision in the discretion of a competent court considering the circumstances surrounding the marriage (ch. 14, §7), such action for annulment being brought only by the infant or his parent or guardian and if there had been no cohabitation after attaining such age (C.P.A., 1133). *The marriage of a person below the age of consent is voidable only (1, 2, 3); the statute as to annulment is not mandatory (4). The marriage of a person of a full eighteen years is not subject to annulment for nonage (5, 6, 7, 8), notwithstanding the fact that a false statement as to age in a license application is criminally punishable (9). Though there was formerly some doubt as to who might bring action for annulment (1, 4, 10), the statute now settles the parent's right to sue regardless of the child's consent (2). But the party who is over the age of consent cannot bring action because of the other's nonage (11). The marriage of a person under age may be ratified and made binding as from the beginning if the parties cohabit after attaining the age of consent (8, 11, 12) or otherwise recognize the relation thereafter (13). It is incongruously true that the statute allowing license issuance with parental*

consent to a person below the age of eighteen [see ch. 14, §15, under 1g] *does not preclude annulment of the marriage of such person even if contracted with parental consent (14). Before any statute was enacted the marriage of a person under the common law ages of fourteen or twelve was subject to disaffirmance (15, 16, 17) and the common law remains in force to the extent that it is not altered by statute (17). The earlier statutes allowed to the nonaged party annulment of an unconfirmed marriage as a matter of right (14, 18, 19, 20, 21, 22, 23, 24, 25). But the existing statute giving to the court discretion in decisions as to annulment for nonage was designed to authorize relief only where the child's inexperience has been taken advantage of (26) and where circumstances point to an unsuccessful marriage and absence of a true family relation (27). Circumstances to be considered are age, education, religious differences (27), attitude of parents (27, 28) and of the parties themselves (29). A mere false oath as to age in a license application, though possibly constituting perjury, does not necessarily bar annulment otherwise appropriate (30). It has been held that New York courts have jurisdiction to annul for nonage a marriage contracted in this state regardless of the residence of the parties (31) and, conversely, to annul the marriage contracted elsewhere by residents of New York in evasion of the New York law (9, 10, 32, 33). This latter doctrine has been disputed (34, 35) because the law of the domicil usually regulates only the status of marriage and the law of the place of contract decides the validity of the contract (33, dissenting opinion). Of course the marriage of two actual residents of another jurisdiction, valid where contracted, cannot be annulled in New York (36). Regardless of the validity of the marriage of a person over the age of consent, an infant under twenty-one years is not liable for breach of an executory contract to marry (37, 38, 39, 40).*

g. Parental Consent.—If the application or other information required by the clerk shows the man to be under twenty-one and over sixteen years or the woman under eighteen and over fourteen years, before issuing a license the town or city clerk shall require the written consent of both parents, or of one parent if the other be dead, missing more than one year and whereabouts unknown, or divorced and custody awarded to the consenting parent, or if both be dead, of the guardian, or if no parent or guardian then of the person in whose custody the minor may be, the persons whose consent is required personally appearing before the clerk and executing the consent if residents of the state and physically able, and if non-residents executing and duly acknowledging the consents without the state which shall be filed with a certificate showing the authority of the

officer to take acknowledgments (ch. 14, §15, as amended L. 1927, ch. 547). [Note: If the application shows the applicant to be under twenty-one years of age, or if the town or city clerk shall be in doubt whether an applicant claiming to be over twenty-one years is actually over such age, before issuing such license the clerk shall require documentary proof of age in the form of an original or certified copy of a birth record, a certification of birth, a baptismal record, passport, life insurance policy, employment certificate, school record, immigration record, nationalization record or court record, showing the date of birth of such minor (ch. 14, §15, as amended L. 1927, ch. 547).] *Penalties.* Any clerk issuing a license to persons one or both of whom shall not be legally competent to marry or who shall not require the production of documentary proof of age or the procuring of the consents provided shall be fined $100 for each offense (ch. 14, §15, as amended L. 1927, ch. 547). Any person wilfully and falsely swearing in regard to any material fact as to the competency of any applicant for a marriage license, in the issuance of which an affidavit or statement is required, is guilty of perjury (ch. 14, §16), punishable by imprisonment not exceeding ten years (ch. 41, §1633). [Note: A person taking a female under eighteen years for the purpose of marriage without the consent of her parent or guardian is punishable by imprisonment for not more than ten years, fine of not more than $1000, or both (ch. 41, §70).] *Parental consent is not necessary to the validity of a marriage at common law (17), and the statute relates the requirement for parental consent only to license issuance, not to the validity of marriage where the person is over the age of consent (7, 8). But regardless of its effect on the validity of a marriage, lack of parental consent may be shown to establish the falsity of representations regarding it (41).* [*See* 4d.]

h. Mental and Physical Qualifications.—[No provision as condition to license issuance in relation to mental incompetency.] A marriage is void from the time its nullity is declared by a competent court if either party is incapable of consenting thereto for want of understanding (ch. 14, §7). [As to penalty for solemnizing marriage of idiots or insane persons, see ch. 41, §1450, under 2g.] *Though idiots and lunatics are incapable of contracting marriage and in absence of a statute their marriages are ipso facto void (42, 43, 44), the statute has been thought to make the marriage of all such persons void only from the time of decree and not subject to collateral attack (45, 46). There is, however, some question as to whether the statute does not apply to idiocy only and not to lunacy (44). However that, it is proper for the*

court in its general equity powers to declare the nullity of the marriage of a lunatic (42, 44), and even under the statute the judicial declaration makes the nullity relate back to the contract of marriage (46). The mental incompetency allowing of annulment must exist at the time of the marriage contract (47, 48, 49) and must be an incapacity to understand the nature and consequences of the act performed (50, 51). Insane delusions or hallucinations on other subjects do not suffice (51). *Findings of an inquisition in lunacy are only presumptive evidence of previous incapacity (52), and adjudication of incompetency for drunkenness may not establish any incapacity to marry (53). Not only the incompetent party but also the capable party to the marriage may sue for annulment (44, 54, 55, 56 contra).*

It shall be the duty of the town or city clerk upon application for a marriage license to require each party to sign and verify a statement as to freedom from venereal disease (ch. 14, §15, as amended L. 1927, ch. 547). *Penalties.* See ch. 14, §§15, 22, under 1k. *Where either party is in such a physical condition that the discharge of matrimonial functions will afflict the other with a loathsome disease, he is not fit to meet marital obligations (57, 58), and actions may be maintained for annulment in cases of a contagious venereal disease (59). Tuberculosis, though not affecting the marriage relation so closely as venereal disease, is yet transmissible by association unless great care is taken, and offspring are born with a predisposition toward it (60). Epilepsy is not a ground for annulment by statute (61): though causing convulsions which make copulation unsatisfactory it does not allow of annulment for physical incapacity, and being transmissible to offspring only in about sixteen per cent of the cases, it does not warrant annulment on considerations of public policy (62). [As to concealment of or misrepresentations concerning venereal disease, tuberculosis, epilepsy, pregnancy, and incontinence constituting fraud to permit of annulment, see* 4d.]

i. Form of License.—The license authorizes the solemnization of the marriage between the parties, contains their names and residences and a full abstract of all the facts ascertained in the application for the license [see 1h and 1k], and has attached thereto the certificate to be returned by the officiant with the license (ch. 14, §14).

j. Record of License.—Each town and city clerk shall record and index all certificates, statements, consents, and licenses immediately upon taking or receiving them, which shall be open to public inspection (ch. 14, §19, as amended L. 1927, ch. 231). *Penalty.* See ch. 14, §22, under 1k. *The supreme court has no power to require the city clerk of the city of New York to amend a record of a marriage license in*

his office so as to state correctly the name of an applicant for license whose own mistake it was that the true name was not given (63).

k. Other Provisions.—It shall be the duty of the town or city clerk upon application for a marriage license to require each of the parties to sign and verify a statement or affidavit before such clerk or deputy containing the name, color, residence, age, occupation, and birthplace of each party, the name—including maiden name of mother—and country of birth of each parent, and number of marriage, containing an assertion, if either applicant has been previously married, whether the former spouse is living and, if divorced, when, where, and against whom the divorce or divorces were granted, and containing an assertion that no legal impediment exists as to the right of either applicant to enter into the marriage state, the town or city clerk—or in cities of the first class any regular clerk in the city clerk's office designated for that purpose—being given full power to administer oaths, to require the applicants to produce witnesses to identify them, and to examine other witnesses as to any material inquiry; and it appearing that the persons are legally competent to marry, the clerk shall issue the license (ch. 14, §15, as amended L. 1927, ch. 547). *The clerk's act is purely ministerial: if the parties make affidavit that they are of age he must issue the license without inquiry (30, dictum).* [But see more recent law, ch. 14, §15, noted under 1g.] *Penalties.* Any clerk violating any provision of this article [including license issuance and recording] or failing to comply therewith shall be fined not exceeding $100 (Sup. ch. 14, §22). Any clerk issuing a license to marry any persons, one or both of whom shall not be legally competent to marry, without first requiring the parties to make such affidavits and statements showing their legal competency shall be fined $100 for each offense (ch. 14, §15, as amended L. 1927, ch. 547). [Ch. 14, §15a, as amended L. 1927, ch. 547, seems to have absolutely no meaning.—G.M.] A person having a spouse living who takes out a license to marry another is guilty of a misdemeanor (ch. 41, §1451), punishable by imprisonment not exceeding one year, fine not exceeding $500, or both (ch. 41, §1937). [See ch. 14, §16, under 1g.] *A person swearing falsely in a marriage license application that he has not been previously married may be guilty of perjury (64).*

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized: (1) by a clergyman or minister of any religion, or the leaders of the Society for Ethical Cul-

ture in Manhattan and Brooklyn; (2) by a mayor, recorder, city magistrate, police justice, or police magistrate of a city, or at his office by the city clerk of a city of over 1,000,000 inhabitants or by deputies or clerks designated by him [see §11a under 2b], except that in cities of between 100,000 and 1,000,000 inhabitants marriage may be solemnized by no city officer other than the mayor or police justice; (3) by a justice or judge of a court of record or municipal court, police justice of a village, or by a justice of the peace except in cities of from 150,000 to 1,000,000 inhabitants (ch. 14, §11, and Sup.; §11-a); but the marriage of a person under twenty-one years shall be solemnized only by those authorized in subdivision one, by the mayor of a city, or by a justice or judge of a court of record or judge of a children's court (ch. 14, §11, as amended L. 1927, ch. 547). Indian marriages may be celebrated by peacemakers within their jurisdictions with the same effect as by justices of the peace (ch. 28, §3). [As to marriages among Quakers and others, see ch. 14, §12, under 2d.]

b. Officiant's Credentials.—[No general provision.] The city clerk of a city of over 1,000,000 inhabitants may designate in writing any of his deputies and not more than two regular clerks to perform marriage ceremonies at the office of such clerk, which designation shall be filed in the office of such city clerk and remain in effect for six months (ch. 14, §11-a). [Note: Every authorized officiant, before performing a marriage in the city of New York, shall register his name and address with the bureau of records of the department of health (Sanitary Code, City of N.Y., §35).]

c. Presentation of License.—The parties shall deliver the license to the officiant before the marriage can be performed (ch. 14, §13). *Penalty.* Any officiant solemnizing any marriage without a license being presented to him shall be punished by a fine of from $50 to $500 or by imprisonment not exceeding one year (ch. 14, §17).

d. Form of Ceremony.—Though no particular form of ceremony is required, the parties must solemnly declare in the presence of the officiant and at least one other witness that they take each other as husband and wife (ch. 14, §12). *Regardless of the expectation of a religious ceremony, a civil ceremony creates all the incidents of the marriage status (65).* Marriages among Friends or Quakers or people of any other denominations having as such any particular ceremony may be solemnized in the manner practiced in their respective societies and shall be valid without relation to the manner of solemnization provided in the preceding sections (ch. 14, §12). Indians contracting marriage according to Indian custom and cohabiting as man and

wife shall be deemed lawfully married (ch. 28, §3). *A marriage among Indians according to Indian custom is valid though it consist of a mere agreement followed by cohabitation as husband and wife until the parties wish to separate (66).*

e. Common Law Marriage.—*A contract* per verba de praesenti *between competent parties to be husband and wife constitutes actual marriage (43, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 85a), especially if followed by cohabitation (43, 69, 76, 77, 80, 83): no formal ceremony is necessary (67, 70, 78, 79, 86, 87, 88, 89, 90). Though a statute in 1901 required solemnization as prescribed for the creation of a marriage (91, 92, 93), repeal of the statute from 1908 re-established the validity of common law marriages (85a, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107 contra). Even though cohabitation under an agreement to marry in the future may seem to render the words presently operative (70), a contract* per verba de futuro cum copula *does not constitute marriage in this state (73, 108). Though an actual present agreement is necessary to create a common law marriage (95, 109), to establish which clear evidence is required and not mere implications (110, 111), marriage like other contracts may be proved not only by positive evidence but by inference from circumstances (78). Though cohabitation and reputation as husband and wife do not themselves constitute marriage (71, 109, 112, 113), they are circumstances from which the fact of actual marriage may be inferred (68, 69, 71, 77, 81, 83, 84, 86, 88, 98, 100, 106, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132). Such presumption is subject to rebuttal by evidence to the contrary (123) and does not arise where the relations were originally illicit (133, 134, 135). The cohabitation must be matrimonial (69, 76, 87, 90, 136, 137, 138), the reputation general (139). More evidence may be necessary to establish a common law marriage from circumstances where one party is morally loose (140).*

Marriage may be solemnized by a written contract of marriage signed by both parties and at least two witnesses, stating the residence of each of the parties and witnesses and the date and place of marriage, and acknowledged before a judge of a court of record by the parties and witnesses in the manner required for the acknowledgment of a conveyance of real estate to entitle the same to be recorded; which contract shall be recorded within thirty days in the office of the State Department of Health and a copy filed in the office of the clerk of the county in which the marriage was solemnized (Sup. ch, 14, §11). [This unique provision, in a section entitled "By Whom a

Marriage Must Be Solemnized," does not concern common law marriages; it is classified here for convenience only.—G.M.] *A marriage by contract otherwise properly executed according to statute is valid notwithstanding failure to file it with the clerk (141).*

Though a relation illicit in origin is presumed to continue so and, notwithstanding cohabitation after removal of the impediment, the evidence must prove an actual contract of marriage (142), a ceremony is not necessary to a valid marriage if the parties originally intended matrimony and the continued cohabitation and recognition is on a different basis such as to show a common law marriage, this although at least one of the parties originally knew of the impediment (67, 69, 93, 97, 99, 103, 105, 114, 119, 122, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154). The subsequent cohabitation must, of course, be matrimonial (155) and must take place at a time when common law marriages are recognized as valid (107, 156). Mere continuance of cohabitation after removal of the impediment may not establish a common law marriage where the impediment was originally known to both parties (157), or where the removal of the impediment is not known at all to the parties who rely solely upon the validity of their ceremonial marriage (158, 101 dictum, 148 contra).

f. Irregular Solemnization.—*If the parties in fact agree to become husband and wife and cohabit and recognize each other as such, want of authority in the officiant and deception as to his character are immaterial to the validity of the marriage (159). Penalty.* Any person not authorized by the laws of this state to perform marriage ceremonies who shall solemnize or presume to solemnize, with intent to deceive, any marriage between any parties is guilty of a misdemeanor (ch. 41, §1450), punishable by imprisonment not exceeding one year, fine not exceeding $500, or both (ch. 41, §1937).

g. Other Provisions.—An authorized officiant to whom a duly issued license may come, not having personal knowledge of the incompetency of either party to contract matrimony, may lawfully solemnize marriage between the parties (ch. 14, §18). *The officiant is fully protected by the marriage license and has no duty to make investigations if he has no personal knowledge of the incompetency of either party (30, dictum). Penalties.* Any authorized officiant solemnizing or presuming to solemnize a marriage with knowledge that either party is legally incompetent to contract matrimony shall be punished by a fine of from $50 to $500 or by imprisonment not exceeding one year (ch. 14, §17). Any person knowingly solemnizing an incestuous marriage or procuring or aiding in such solemnization shall be fined

from $50 to $100 and may also be imprisoned not exceeding six months (ch. 14, §5). An officiant solemnizing a marriage when either party is known to him to be under the age of legal consent—eighteen years—or an idiot or insane person, or a marriage to which he knows a legal impediment to exist, is guilty of a misdemeanor (ch. 41, §1450; ch. 14, §7), punishable by imprisonment not exceeding one year, fine not exceeding $500, or both (ch. 41, §1937). [This penalty for solemnizing marriages of persons under the age of consent is inconsistent with other provisions allowing such marriages if parental consent is given. See ch. 14, §15, under 1g.—G.M.]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant shall return to the issuer on or before the fifth day of the succeeding month the license, including the abstract of facts, and the certificate signed by him (Sup. ch. 14, §14). *Penalty.* Any person wilfully neglecting to make such return within the required time shall be fined from $25 to $50 for each offense (ch. 14, §14).

The officiants who perform marriages in the city of New York shall keep a registry of the marriages celebrated by them containing the name, residence, and condition, whether single or widowed, of each party (Greater New York Charter, §1236). *Penalty.* For every omission to keep the required registry of marriages and to file a written copy thereof with the Department of Health of the City of New York within ten days after any marriage a person is liable to fine of $100 to be recovered in the name of the said department in a civil action, unless the Commissioner of Health for sufficient reason excuses such omission (Greater New York Charter, §1239).

b. Local Record.—Each town and city clerk shall record and index all licenses together with the certificate attached, showing the performance of the ceremony, which shall be part of the public records of his office, and such clerk, except the clerk of the city of New York, shall file monthly in the office of the county clerk of the county in which such municipality is situated a copy of each license and certificate, but only after the certificate is returned showing the marriage actually performed; the city clerk of the city of New York shall file monthly with the county clerk of the county in which the license was issued the originals of each affidavit, statement, consent, license and certificate (ch. 14, §19, as amended L. 1927, ch. 231). [There are five counties within the city of New York.—G.M.] *Penalty.* See ch. 14, §22, under 1k.

The Department of Health of the City of New York shall keep a record of marriages filed with it (Greater New York Charter, §1240). Certificates of marriage not filed in such department within the time provided may be recorded in the discretion of the Commissioner of Health (Greater New York Charter, §1239a).

c. State Record.—The town or city clerk, except of New York City, shall file monthly in the office of the State Department of Health the original of each affidavit, statement, consent, license, and certificate filed during the preceding month (ch. 14, §19, as amended L. 1927, ch. 231). *Penalty.* See ch. 14, §22, under 1k. All original affidavits, statements, consents, and licenses with certificates, and all written contracts of marriage outside the city of New York, shall be filed and indexed by the State Department of Health, and if upon examination they prove incomplete or unsatisfactory the State Commissioner of Health shall require such further information as may be necessary (Sup. ch. 14, §20).

d. Evidence.—An original certificate of marriage, within the state, made by the officiant, the original entry thereof by the city or town clerk, or a duly certified copy of the certificate or entry, is presumptive evidence of the marriage (C.P.A. 372). *For a marriage certificate to be admissible it must be in substantial compliance with statutory requirements (160, 161). A statement in an application for marriage license that this is to be the person's second marriage is admissible in proof of his first marriage (162).* Any transcript of the record of a marriage, properly certified by the State Commissioner of Health or person authorized to act for him, shall be prima facie evidence in all courts of the facts therein stated (Sup. ch. 14, §20a). Properly certified foreign official records are evidence (C.P.A. 398). *But a certificate by an official in Italy does not itself necessarily establish the marriage (163). Entry of a marriage in the parish register is evidence only if the register is required by law to be kept (164, 165).* [Note: When a mistake is claimed to have been made in the papers filed with the State Department of Health, the state commissioner may file with them affidavits of the person claiming to be aggrieved by such mistake showing the true facts (Sup. ch. 14, §20).]

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (ch. 14, §5). A marriage within prohibited degrees is void (ch. 14, §5). *Though courts of chancery may declare void the marriage of persons related*

lineally or related collaterally to the first degree (42), beyond the immediate family circle marriage is forbidden only upon positive legislative enactment (166). First cousins may marry (167, 168). The marriage between a woman and the half-brother of her parent is void in the same way as the marriage of a niece with her full uncle (169). Penalty. The parties to a marriage within the prohibited degrees shall each be fined from $50 to $100 and may also be imprisoned not exceeding six months (ch. 14, §5). Persons intermarrying within the prohibited degrees are each punishable by imprisonment for not more than ten years (ch. 41, §1110). [As to penalty for solemnizing such marriage, see ch. 14, §5, under 2g.]

b. Proper Civil and Racial Status.—No provision. [As to Indian marriages see ch. 28, §3, under 2d. As to effect of life imprisonment upon marriage see ch. 14, §6, under 4c.]

c. Proper Legal Status.—A marriage contracted by a person whose former spouse is living is absolutely void unless such former marriage has been annulled, declared void, or dissolved for a cause other than the adultery of such person [see ch. 14, §8, hereinafter] or such former spouse has been finally sentenced to imprisonment for life or the former marriage has been dissolved on the ground of absence (ch. 14, §6). *The marriage of a person already married is utterly void (67, 69, 91, 92, 102, 104, 105, 107, 114, 125, 144, 148, 157, 161, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195), is not subject to ratification (107), confers no matrimonial rights (172), forms no restraint upon the marriage of the innocent party to a third person (181, 185), and will not support a bigamy prosecution in case of a yet later marriage (184). Neither good faith (196) nor the length of absence of the prior spouse, regardless of the bigamy exception, is material to the invalidity of the later marriage if the earlier in fact still subsists (67, 170, 177, 189). In the interest of good order such void marriages are yet subject to a declaration of nullity (102, 131, 173, 180), on suit of any of the three persons concerned, under the Civil Practice Act (102), or even without statute on suit of the innocent party (92, 183, 188, 197, 198). A person sentenced to imprisonment for life being civilly dead, the spouse may elect validly to contract another marriage (199).* A person having a spouse living who marries another is punishable by imprisonment for not more than five years (ch. 41, §340). *It is immaterial that the other party to the bigamous marriage was also incompetent to marry (200).* [As to penalty for procuring a license for such marriage, see ch. 41, §1451, under 1k.] The last section does not apply where

the former spouse has been absent for the preceding five years without being known to the person marrying again to be living within that time and believed dead, where the former marriage has been pronounced void, annulled, or dissolved for a cause other than his adultery or if so divorced is permitted to marry again, or where the former spouse has been sentenced to imprisonment for life (ch. 41, §341). *A divorce subsequent to the second marriage is no defense to a bigamy prosecution (201). A person remarrying after five years' absence of the spouse is exempted from penalty only if he had a belief in the spouse's death, not mere lack of knowledge (202) or mere report of her death within a period shorter than five years (203).* [*As to remarriage of guilty party to divorce constituting bigamy, see infra.*] Upon petition showing a spouse to have absented himself for the five preceding years without being known to the petitioner to be living and upon diligent search believed dead, the supreme court after publication of notice of such petition and after hearing may dissolve the marriage (ch. 14, §7a). *The presumption of death arising after an absence of seven years (114, 191, 204), the spouse of the absentee thereafter may remarry (144). The ground for a proceeding to dissolve a marriage because of absence under the present statute is not the mere absence but the presumption of death arising therefrom (205). The petitioner for dissolution must show a warranted belief in the death of the absentee after diligent search (206, 207, 208). If there is no such dissolution the later marriage is void if the absentee is in fact alive (194, 209). Under the statute prior to 1922 a subsequent marriage contracted in good faith after a spouse's absence for five years was voidable only and not subject to collateral attack (74, 97, 124, 130, 145, 177, 186, 194, 210, 211, 212, 213, 214, 216, 217, 218, 219, 220, 221, 222). The one remarrying had to believe bona fide in the absentee's death after reasonable inquiry (81, 179, 223, 224, 225, 226, 227, 228).*

Upon dissolution of a marriage the complainant may marry again, but the defendant for whose adultery the divorce has been granted may not marry during the lifetime of the complainant, if the divorce was granted in this state, unless the court shall modify such judgment in that respect after a lapse of three years upon satisfactory proof that the defendant's conduct has been uniformly good, and if the divorce was granted in another jurisdiction unless three years have elapsed and there is no legal impediment to such marriage in the jurisdiction where judgment was granted (ch. 14, §8). *Though the remarriage of the innocent party to a divorce action is proper (229), the remarriage of the guilty party is absolutely void (187, 213, 216, 230, 231, 232, 233, 234) and subject to collateral attack (213). The prohibition*

precludes even the parties to the divorce from intermarrying again without leave of court (235, 236). Though a divorced spouse is in no sense a spouse, the bigamy statute makes it a crime to remarry during the life of a divorced spouse when the divorce decree prohibits remarriage (237, 238). The prohibition affects only marriages contracted in this state (239, 240); the marriage here of a person divorced elsewhere for adultery is void (241), but the marriage abroad of a person divorced here cannot be declared void here (84, 242, 243, 244, 245, 246, 247). Interlocutory judgment for divorce does not dissolve the marriage relation, and remarriage before entry of final decree is absolutely void (91, 99)—unless contracted in good faith just a few hours before such actual entry and on the same day (248).

There is a presumption in favor of the validity of a later marriage, the more so if the marriage was ceremonial (249), which puts on the opponent thereof the burden of proving its invalidity (101, 127, 130, 250, 251, 252, 253, 254, 255, 256, 257, 258). The presumption does not arise if a party to the later marriage knows his prior spouse to be alive (175).

d. Proper Consent of Parties.—Marriage is a civil contract to which the consent of parties capable in law of contracting is essential (ch. 14, §10). *Though a marriage is complete only if there be full, free, mutual consent between parties capable of contracting, regardless of lack of subsequent cohabitation (259), where the act of marriage was clear a formal ceremony may not be annulled by a mere declaration of either party that they did not intend marriage or by any other mental reservation or secret intention (260), expressed for instance by a silent withholding of assent to the ceremony (261). But a marriage ceremony lacking matrimonial consent and gone through as a mere subterfuge to obtain a theatrical engagement without parental consent will be annulled (262).*

A marriage is void from the time its nullity is declared by a competent court if either party consent thereto by reason of force, duress, or fraud (ch. 14, §7). *A marriage procured by fraud is void only from the time of a judicial declaration of its nullity, which does not relate back to make it void ab initio, and is not subject to collateral attack (107, 215, 263, 264). Free consent is essential to the marriage contract (265); a marriage induced by getting a party thereto intoxicated may be annulled (266). The fraud precluding consent and warranting annulment must go to the essence of the marriage contract (57, 267, 268), must be material to the ordinary concept of marriage or to the supposed intention of the parties contracting marriage (269), must be known to the*

party guilty of the false representation or concealment (61), must be intended to induce the marriage, and must deceive the innocent party (270, 271, 272, 273). Though chastity is not so essential to the marriage relation that its fraudulent representation or concealment of its absence will allow of annulment (271, 274, 275, 276), pregnancy of the wife by a stranger at the time of marriage, unknown to the husband who has himself had no antenuptial sexual connexion with her, does allow of annulment (277, 278, 279, 280) because it prevents the matrimonial function and confuses property rights among the issue (275). But annulment is not allowed where the husband knew of the wife's pregnancy before marriage (281) or where she represented herself as pregnant by him as a result of their antenuptial relations when in fact not pregnant at all (282). [Note: One who marries a woman, however, believing in her virtue, upon representation of another man by whom she is at the time pregnant may maintain action for damages against the wrong-doer on the broad ground of loss of consortium caused by this fraud (283).] Though general bodily health is not an essential of the marriage relation (268, 284) and fraudulent concealment of a swollen tongue or inflammation of the bladder is no ground for annulment (285), failure to disclose an affliction detrimental to the marriage relation, such as a vaginal or venereal disease, at least if chronic and communicable, constitutes fraud warranting annulment (57, 58, 286, 287). And it has been held that a representation that one is not a drug-addict when in fact a physical wreck from use of drugs may allow of annulment (288). In a similar manner, though misrepresentations of good character and property possessions are not material fraud (289), if the innocent party made cautious inquiry such misrepresentations may permit of annulment where the person is in fact a professional thief (290), follows a criminal profession (291, 292), or desires the marriage only to get the other person's money and with no intention of consummation (293). The following have also been held to constitute fraud sufficient for annulment: false representations of parental consent and assurance of secrecy (41) and representations that the parties would not regard the relationship as a marriage until after parental consent had been obtained and a new ceremony performed, the marriage in both cases being unconsummated and the innocent party very young (294); pretending to an aged believer in spiritualism to be a clairvoyant and able to cure his ills (295); and false representations of American citizenship where the marriage would mean the woman's loss of her American citizenship thereby and consequent loss of her position (296). Mere concealment of a former marriage does not vitiate a later marriage otherwise valid (253): misrepresentation that one has not been previously married when in fact a previous marriage had been void (297)

or had been dissolved (267), or misrepresentation that a prior spouse was dead when in fact divorced, is not adequate fraud (269); but such false representation may allow of annulment where it is a misstatement of capacity to marry, e.g., where divorce from a prior spouse prohibits remarriage (233, 298) or where a former spouse has been absent less than five years (190, 273). [See cases following ch. 14, §7a, under 4c.] *[Note: Incidentally one marrying another in good faith and ignorance of the other's subsisting marriage has an action for damages (174, 299).] Annulment will not be granted for representations that one is over twenty-one years when in fact but twenty, for a marriage over eighteen is valid (5), or for protestations of undying love, false as they may later prove (300).*

After consummation of a marriage and its development into a public status a fraud is not material and does not warrant annulment unless it goes to the essentials of the contract, the scope of which is, of course, plastic (301). But in New York there has developed a further doctrine: before consummation and ripening into a status any fraud, but for the perpetration of which consent would not have been given and marriage would not have taken place, is material and allows of annulment (301, 302, 303, 304). The relation before marriage is one of trust (305, 306). Where the false representation was a material inducement to marriage, annulment has been granted in such cases as the following: misrepresentation that the parties would engage in a joint business enterprise after marriage (303) or that the man is father of a child which the woman actually procured by stratagem (302); concealment of family and personal history of insanity (306) or of a previous marriage which had been annulled (305). Though it has been held that the material fraud to permit of annulment must relate to an existing fact and not be a mere prophecy (307, 308), the most recent cases have decided that misrepresentations of intention as to future actions are themselves to be deemed fraud as to an existing fact (the person's present intention) and have allowed annulment for an unfulfilled promise to go through a religious solemnization after a civil ceremony (309, 310, 311). While this New York doctrine would seem to rest on the basis that an unconsummated marriage is really like a mere executory contract to marry (312), courts have stretched it further to include cases of consummated marriages in which there are no children (60) and cohabitation ceased upon discovery of the fraud (313) and, where there would have been no consent but for the fraud, have allowed annulment for direct misrepresentation of chastity (313, 314) and of freedom from incurable tuberculosis (60). [Note: Though a man whom another falsely personates in contracting a marriage can not have the marriage between such other persons annulled, his name falsely appearing on the marriage certificate will be changed

and the woman enjoined from claiming as his wife (315).] *Penalty.* Anyone falsely personating another and in such assumed character marrying or pretending to marry or sustain the marriage relation towards another, with or without the connivance of such other, is punishable by imprisonment not exceeding ten years (ch. 41, §928).

A marriage induced by duress is voidable only (263, 316); upon decree, however, it is declared void ab initio as if it had never existed (317). A marriage is voidable for duress if procured upon threat of death (318, 319) or of bodily violence (316, 320) and destruction of property (320) or, at least if unconsummated, upon threat to divulge liberties taken with the woman, which knowledge might have killed her father suffering from heart trouble (312). To allow of annulment the other contracting party must either cause the duress or must knowingly avail himself of it to procure the contract (321). Prosecution for bastardy is not duress sufficient to avoid a marriage contract (259, 277). Penalty. A person compelling the marriage of a woman against her will, or taking a woman with intent to compel her marriage, is punishable by imprisonment not exceeding ten years, fine not exceeding $1000, or both (ch. 41, §§532, 70).

A marriage induced by fraud may be ratified and made binding by voluntary cohabitation after discovery of the fraud (61, 268, 274, 297, 310, 322) or by other acts in recognition of the marriage relation (272, 323).

5. STATE SUPERVISION

The registration and recording of all marriages outside the city of New York shall be under the supervision of the State Commissioner of Health who, either personally or by representative, may at any time inspect the record and index of marriage licenses issued by any town or city clerk and may promulgate rules for insuring complete registration, and shall report cases of violation to the district attorney, who shall forthwith initiate court proceedings against the person responsible for the alleged violation, the Attorney General assisting in the enforcement of this article upon request of the commissioner (Sup. ch. 14, §23). The State Department of Health shall prepare blank forms for marriage licenses and certificates, statements and affidavits, and books for registration, and shall furnish them to town and city clerks (Sup. ch. 14, §21).

6. INTERSTATE RELATIONS

No statutory provision. [As to remarriage in New York of a person divorced elsewhere for adultery, see ch. 14, §8, under 4c.] *Ca-*

pacity to marry depends upon the law of the place of contract (36, 189, 195, 240, 241, 324, 325, 33 dissenting opinion); a marriage valid where contracted is valid everywhere (9, 32, 34, 35, 93, 239, 243, 261, 326, 327, 328, 329, 330) regardless of intent to evade the law of the parties' domicil (84, 236, 243, 244, 245, 246, 247, 331, 332, 333 contra overruled), unless polygamous, incestuous, or contrary to the express public policy of the domicil (85, 92, 93, 240, 243). Though the validity of the marriage contract depends upon the law of the place of contract, the law of the domicil determines whether the marriage status is created (334). And conversely though a marriage invalid where contracted is generally invalid everywhere, the marriage of citizens of one country sojourning in another, solemnized according to the law of their domicil and not in accord with the law of the place of contract, may yet be valid as a contract per verba de praesenti *followed by cohabitation (124). The marriage of a foreigner in a consulate can have no validity if in accordance with neither the law of the place of contract nor of the parties' domicil (335). The New York statute prohibiting remarriage of the guilty party to a divorce, being penal in nature, has no extraterritorial effect upon marriages validly contracted elsewhere (236, 239, 240, 242, 243, 244, 245, 246, 247, 336, 337 dictum), and a like statute of another state does not affect a valid remarriage here (328, 330). The New York statute as to annulment for nonage has no extraterritorial effect upon the validity of a marriage contracted elsewhere between persons domiciled elsewhere (36).*

7. SEX OFFENSES AND MARRIAGE

Subsequent intermarriage of the parties is a bar to prosecution for seduction under promise of marriage (ch. 41, §2176). *The defendant marrying the prosecutrix at any time before actual rendering of judgment is within the statute requiring discharge from custody (338).*

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[Note: M. is used to refer to Miscellaneous Reports and A.D. to Appellate Division. Other abbreviations are in general use.]

1. Wood v. Baker, 43 M. 310 (1904). **2.** Wolf v. Wolf, 194 A.D. 33 (1920); reversing 111 M. 391 (1920). **3.** Kuykendall v. Kuykendall, 112 M. 12 (1920). **4.** Magee v. Nealon, 108 M. 396 (1919). **5.** Williams v. Williams, 71 M. 590 (1911). **6.** Padula v. Padula, 96 M. 597 (1916). **7.** Greenberg v. Greenberg, 97 M. 153 (1916).

8. Allerton v. Allerton, 104 M. 627 (1918). **9.** Bays v. Bays, 105 M. 492 (1918). **10.** Marone v. Marone, 105 M. 371 (1918). **11.** Long v. Baxter, 77 M. 630 (1912). **12.** Herrman v. Herrman, 93 M. 315 (1916); affirmed, 176 A.D. 914 (1917). **13.** Terrky v. Terrky, 96 M. 594 (1916). **14.** Kruger v. Kruger, 137 A.D. 289 (1910); reversing 64 M. 382 (1909). **15.** Aymar v. Roff, 3 Johns. Ch. 49 (1817). **16.** Coleman's Case, 6 City H. Rec. 3 (1821). **17.** Bennett v. Smith, 21 Barb. 439 (1856). **18.** Silveira v. Silveira, 34 M, 267 (1901). **19.** Conte v. Conte, 82 A.D. 335 (1903). **20.** Quigg v. Quigg, 42 M. 48 (1903).

21. Earl v. Earl, 96 A.D. 639 (1904). **22.** Wander v. Wander, 111 A.D. 189 (1906). **23.** Mundell v. Coster, 80 M. 337 (1913). **24.** Macri v. Macri, 177 A.D. 292 (1917). **25.** Price v. Price, 178 Supp. 561 (1919); affirmed, 194 A.D. 158 (1920). **26.** Todaro v. Todaro, 120 M. 807 (1923). **27.** Foley v. Foley, 122 M. 663 (1924). **28.** Lazarczyk v. Lazarczyk, 122 M. 536 (1924); former hearing, 121 M. 723 (1923). **29.** Keegan v. Keegan, 209 A.D. 74 (1924). **30.** Kellogg v. Kellogg, 122 M. 734 (1924). **31.** Becker v. Becker, 58 A.D. 374 (1901). **32.** Mitchell v. Mitchell, 63 M. 580 (1909). **33.** Cunningham v. Cunningham, 206 N.Y. 341 (1912); reversing 145 A.D. 919 (1911); which affirmed 70 M. 129 (1910). **34.** Donohue v. Donohue, 63 M. 111 (1909). **35.** Reid v. Reid, 72 M. 214 (1911). **36.** Simmons v. Simmons, 208 A.D. 195 (1924). **37.** Hunt v. Peake, 5 Cow. 475 (1826). **38.** Willard v. Stone, 7 Cow. 21 (1827). **39.** Hamilton v. Lomax, 26 Barb. 615 (1858); also, 6 Abb. Pr. 142. **40.** Feibel v. Obersky, 13 Abb. Pr. N.S. 402 note (1872).

41. Moot v. Moot, 37 Hun 288 (1885). **42.** Wightman v. Wightman, 4 Johns. Ch. 343 (1820). **43.** Jaques v. Public Administrator, 1 Bradf. Surr. 499 (1851). **44.** Whitney v. Whitney, 121 M. 485 (1923). **45.** Stuckey v. Mathes, 24 Hun 461 (1881). **46.** Jones v. Brinsmade, 183 N.Y. 258 (1905); reversing 104 A.D. 619. **47.** Forman v. Forman, 53 St. Rep. 639 (1893); also, 24 Supp. 917. **48.** Kemmelick v. Kemmelick, 114 M. 198 (1921). **49.** Conrad v. Conrad, 121 M. 641 (1923). **50.** Doe v. Roe, 1 Edm. Sel. Cas. 344 (1846). **51.** Meekins v. Kinsella, 152 A.D. 32 (1912). **52.** Banker v. Banker, 63 N.Y. 409 (1875); affirming 4 Hun 259. **53.** Anderson v. Hicks, 150 A.D. 289 (1912). **54.** Liske v. Liske, 135 Supp. 176 (1912). **55.** Marvis v. Marvis, 216 A.D. 291 (1926); reversing 125 M. 309 (1925). **56.** Reed v. Reed, 106 M. 85 (1919); affirmed, 195 A.D. 531 (1921). **57.** Anonymous, 21 M. 765 (1897). **58.** Svenson v. Svenson, 178 N.Y. 54 (1904); reversing 78 A.D. 536 (1903). **59.** Anonymous, 34 M. 109 (1901). **60.** Sobol v. Sobol, 88 M. 277 (1914).

61. McGill v. McGill, 179 A.D. 343 (1917); reversing 99 M. 86 (1917); judgment affirmed, 226 N.Y. 673 (1919). **62.** Elser v. Elser, 160 Supp. 724 (1916). **63.** Matter of Bjune, 109 M. 247 (1919). **64.** People v. Lecesse, 148 Supp. 929 (1914). **65.** Mirizio v. Mirizio, 242 N.Y. 74 (1926); reversing 212 A.D. 524 (1925). **66.** People ex rel. La Forte v. Rubin, 98 Supp. 787 (1905). **67.** Fenton v. Reed, 4 Johns. 52 (1809). **68.** Jenkins v. Bisbee and Appell, 1 Edw. Ch. 377 (1832). **69.** Rose v. Clark, 8 Paige 574 (1841). **70.** Starr v. Peck, 1 Hill 270 (1841). **71.** Clayton v. Wardell, 4 N.Y. 230 (1850); affirming 5 Barb. 214 (1849). **72.** People ex rel. Trainer v. Cooper, 8 How. Pr. 288 (1853). **73.** Cheney v. Arnold, 15 N.Y. 345 (1857); affirming Cheeney v. Arnold, 18 Barb. 434 (1854). **74.** White v. Lowe, 1 Redf. Surr. 376 (1862). **75.** Bissell v. Bissell, 55 Barb. 325 (1869); also, 7 Abb. Pr. N.S. 16. **76.** Van Tuyl v. Van Tuyl, 57 Barb. 235 (1869); also, 8 Abb. Pr. N.S. 5. **77.** Brinkley v. Brinkley, 50 N.Y. 184 (1872). **78.** Wright v. Wright, 48 How. Pr. 1 (1874). **79.** Davis v. Davis, 7 Daly 308 (1877); affirming 1 Abb. N.C. 140 (1876). **80.** Hynes v. McDermott, 91 N.Y. 451 (1883); affirming 10 Daly 423 (1882); 82 N.Y. 41 (1880); 9 Daly 4 (1879); 7 Abb. N.C. 98 (1879).

81. Gall v. Gall, 114 N.Y. 109 (1889); affirming 12 St. Rep. 604 (1887). **82.** Herz v. Herz, 34 M. 125 (1901). **83.** Tracy v. Frey, 95 A.D. 579 (1904). **84.** Matter of Garner, 59 M. 116 (1908). **85.** Davidson v. Ream, 97 M. 89 (1916); affirmed, 178 A.D. 362 (1917). **85a.** Matter of Ziegler v. Cassidy's Sons, 220 N.Y. 98 (1917); affirming 171 A.D. 959 (1915). **86.** Tummalty v. Tummalty, 3 Bradf. Surr. 369 (1855). **87.** Cunningham v. Burdell, 4 Bradf. Surr. 343 (1857). **88.** Durand v. Durand, 2 Sweeny 315 (1870). **89.** Renholm v. Public Administrator, 2 Redf. Surr. 456 (1877). **90.** Byrnes v. Dibble, 5 Redf. Surr. 383 (1881). **91.** Pettit v. Pettit, 105 A.D. 312 (1905); reversing 45 M. 155 (1904). **92.** Earle v. Earle, 141 A.D. 611 (1910). **93.** Matter of Seymour, 113 M. 421 (1920). **94.** Matter of Hinman, 147 A.D. 452 (1911); affirmed, 206 N.Y. 653 (1912). **95.** Matter of Smith, 74 M. 11 (1911). **96.** Matter of Reinhardt, 95 M. 413 (1915). **97.** Matter of Biersack, 96 M. 161 (1916); affirmed, 179 A.D. 916 (1917). **98.** Matter of Spondre, 98 M. 524 (1917). **99.** Wilson v. Burnett, 105 M. 279 (1918). **100.** Matter of Mancini, 108 M. 102 (1919).

101. Smith v. Smith, 194 A.D. 543 (1920). **102.** Nani v. Nani, 120 M. 249 (1923). **103.** Matter of Crandall, 214 A.D. 363 (1925). **104.** City of New York v. Caputo, 127 M. 595 (1926). **105.** Bamberger v. Bamberger, 128 M. 1 (1926). **106.** Boyd v. U.S., 8 Fed.

(2d) 779 (1925). **107.** McCullen v. McCullen, 162 A.D. 599 (1914). **108.** Arnold v. Chesebrough, 58 Fed. 833 (1893); affirming 46 Fed. 700 (1891). **109.** Graham v. Graham, 211 A.D. 580 (1924). **110.** In re Rossignot's Will, 112 Supp. 353 (1905). **111.** Bullock v. Bullock, 85 Hun 373 (1895). **112.** Davis v. Brown, 1 Redf. Surr. 259 (1859). **113.** Matter of Brush, 25 A.D. 610 (1898). **114.** Jackson ex dem. Van Buskirk v. Claw, 18 Johns. 346 (1820). **115.** In the matter of Taylor, 9 Paige 611 (1842). **116.** Hicks v. Cochran, 4 Edw. Ch. 107 (1842). **117.** Grotgen v. Grotgen, 3 Bradf. Surr. 373 (1855). **118.** Hill v. Burger, 3 Bradf. Surr. 432 (1856). **119.** Hyde v. Hyde, 3 Bradf. Surr. 509 (1856). **120.** Christie's Estate, 1 Tuck. Surr. 81 (1869).

121. People ex rel. Commissioners v. Bartholf, 24 Hun 272 (1881). **122.** Estate of Jennings, 4 Month. L. Bul. 40 (1881). **123.** Newton v. Southworth, 7 St. Rep. 130 (1887); also, 26 Weekly Dig. 170. **124.** Wilcox v. Wilcox, 46 Hun 32 (1887). **125.** Matter of Hamilton, 2 Con. Surr. 471 (1891); affirmed, 76 Hun 200 (1894). **126.** Nolan v. Nolan, 35 A.D. 339 (1898). **127.** Matter of Grande, 80 M. 450 (1913). **128.** Barr v. Howell, 85 M. 330 (1914). **129.** Matter of Watson, 97 M. 538 (1916); affirmed, 175 A.D. 956 (1916). **130.** Matter of Cassidy, 109 M. 202 (1919). **131.** Procita v. Procita, 190 Supp. 21 (1921). **132.** Ellis v. Kelsey, 118 M. 763 (1922); affirmed, 208 A.D. 774 (1924). **133.** Ahlberg v. Ahlberg, 24 Supp. 919 (1893). **134.** Bates v. Bates, 7 M. 547 (1894). **135.** U.S. Trust Co. v. Maxwell, 26 M. 276 (1899). **136.** Soper v. Halsey, 85 Hun 464 (1895). **137.** Makel v. John Hancock M.L. Ins. Co., 95 A.D. 241 (1904). **138.** Gaines v. Fidelity and Casualty Co., 111 A. D. 386 (1906); affirmed, 188 N.Y. 411 (1907). **139.** Badger v. Badger, 88 N.Y. 546 (1882); reversing 25 Hun 230 (1881) and 13 Weekly Dig. 35. **140.** Bell v. Clarke, 45 M. 272 (1904).

141. Kahn v. Kahn, 62 M. 550 (1909); affirmed, 133 A.D. 889 (1909); previous hearing, 60 M. 334 (1908). **142.** Foster v. Hawley, 8 Hun 68 (1876). **143.** Polar Star M.B. Ass'n. v. Boniface, N.Y. Daily Reg. 3 Feb. 1885; also, 20 Weekly Dig. 522. **144.** Fordham v. Gouverneur Village, 5 A.D. 565 (1896). **145.** Taylor v. Taylor, 25 M. 566 (1898); affirmed, 63 A.D. 231 (1901); affirmed, 173 N.Y. 266 (1903). **146.** Townsend v. Van Buskirk, 33 M. 287 (1900); prior appeal, 22 A.D. 441 (1897). **147.** Matter of Schmidt, 42 M. 463 (1904). **148.** Matter of Wells, 123 A.D. 79 (1908); affirmed, 194 N.Y. 548 (1909). **149.** Geiger v. Ryan, 123 A.D. 722 (1908). **150.** Matter of Spink, 62 M. 158 (1909). **151.** Matter of Terwilliger, 63 M. 479 (1909). **152.** Leeds v. Joyce, 202 A.D. 696

(1922); affirmed, 234 N.Y. 604 (1922); and 235 N.Y. 620 (1923). **153.** Applegate v. Applegate, 118 M. 359 (1922). **154.** Sorenson v. Sorenson, 122 M. 196 (1924). **155.** Stanley v. Stanley, 4 Dem. Surr. 416 (1886); also, 1 St. Rep. 325. **156.** Barker v. Barker, 172 A.D. 244 (1916); affirming 92 M. 390 (1915); motion for reargument denied, 174 A.D. 883 (1916). **157.** Hill v. Vrooman, 215 A.D. 847 (1926); affirmed, 242 N.Y. 549. **158.** Collins v. Collins, 80 N.Y. 1 (1880). **159.** Hayes v. People, 25 N.Y. 390 (1862); affirming 5 Park. Cr. 325; also, 15 Abb. Pr. 163. **160.** Dann v. Kingdom, 1 T. and C. 492 (1873).

161. People v. Crawford, 62 Hun 160 (1891); affirmed, 133 N.Y. 535 (1892). **162.** People v. Portman, 159 A.D. 702 (1913). **163.** Grillo v. Sherman-Stalter Co., 195 A.D. 362 (1921); affirmed, 231 N.Y. 621. **164.** Maxwell v. Chapman, 8 Barb. 579 (1850). **165.** Chambers v. Chambers, 24 Civ. Proc. R. 187 (1895); also, 32 Supp. 875. **166.** In re Williams, 2 City Ct. 143 (1885). **167.** In re Hampe, 2 City Ct. 401 (1887). **168.** Weisberg v. Weisberg, 112 A.D. 231 (1906). **169.** Audley v. Audley, 196 A.D. 103 (1921); reversing 112 M. 146 (1920). **170.** Williamson v. Parisien, 1 Johns. Ch. 389 (1815). **171.** Prentice v. Achorn, 2 Paige 30 (1830). **172.** Amory v. Amory, 6 Rob. 514 (1866); also, 33 How. Pr. 490. **173.** Lincoln v. Lincoln, 6 Rob. 525 (1866). **174.** Blossom v. Barrett, 37 N.Y. *434 (1868). **175.** O'Gara v. Eisenlohr, 38 N.Y. 296 (1868). **176.** Appleton v. Warner, 51 Barb. 270 (1868). **177.** Spicer v. Spicer, 16 Abb. Pr. N.S. 112 (1873). **178.** Finn v. Finn, 62 How. Pr. 83 (1878). **179.** Machini v. Zanoni, 5 Redf. Sur. 492 (1882). **180.** Combs v. Combs, 17 Abb. N.C. 265 (1885).

181. Estate of Hetherington, 25 Weekly Dig. 4 (1886). **182.** Hopper v. Hopper, 92 Hun 415 (1895). **183.** McCarron v. McCarron, 26 M. 158 (1899). **184.** People v. Corbett, 49 A.D. 514 (1900). **185.** Stein v. Dunne, 119 A.D. 1 (1907); affirmed, 190 N.Y. 524 (1907). **186.** Chittenden v. Chittenden, 64 M. 649 (1909); affirmed, 137 A.D. 932 (1910); 68 M. 172 (1910). **187.** Dye v. Dye, 140 A.D. 309 (1910). **188.** Brown v. Brown, 153 A.D. 645 (1912). **189.** Matter of Kutter, 79 M. 74 (1913). **190.** Butler v. Butler, 93 M. 258 (1916). **191.** Wolf v. Wolf, 109 M. 366 (1919); affirmed, 191 A.D. 925 (1920). **192.** Matter of Wright, 110 M. 480 (1920). **193.** Matter of Cofer, 119 M. 587 (1922); affirmed, 206 A.D. 657 (1923); affirmed, 237 N.Y. 512 (1923). **194.** Atkinson v. Atkinson, 121 M. 659 (1923); affirmed, 207 A.D. 660 (1924). **195.** Van Wyk v. Realty Traders, 215 A.D. 254 (1926). **196.** Anonymous, 15 Abb. Pr. N.S. 311 (1873); 15 Abb. Pr. N.S. 171 (1874); also, 2 T. and C.

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201. Baker v. People, 2 Hill 325 (1842). **202.** People v. Meyer, 8 St. Rep. 256 (1887). **203.** People v. Dauchy, 148 A.D. 366 (1911). **204.** Dietrich v. Dietrich, 128 A.D. 564 (1908). **205.** Pitcairn v. Pitcairn, 119 M. 37 (1922). **206.** In re Carey, 196 Supp. 773 (1922). **207.** Frankish v. Frankish, 206 A.D. 301 (1923). **208.** Matter of Entenman, 122 M. 441 (1924). **209.** Hayden v. Hayden, 127 M. 162 (1926). **210.** Valleau v. Valleau, 6 Paige 207 (1836). **211.** Cropsey v. McKinney, 30 Barb. 47 (1859). **212.** Griffin v. Banks, 24 How. Pr. 213 (1862); reversed on other ground, 37 N.Y. *621 (1868). **213.** Matter of Borrowdale, 28 Hun 336 (1882). **214.** Nesbit v. Nesbit, 3 Dem. Surr. 329 (1885). **215.** Taylor v. Taylor, 181 Supp. 894 (1920). **216.** Matter of Tabor, 31 M. 579 (1900). **217.** Hervey v. Hervey, 92 Supp. 218 (1905). **218.** Matter of Del Genovese, 56 M. 418 (1907); affirmed, 136 A.D. 894 (1909). **219.** Stokes v. Stokes, 198 N.Y. 301 (1910); reversing 128 A.D. 838 (1908). **220.** Matter of McKinley, 66 M. 126 (1910).

221. Summo v. Snare and Triest Co., 166 A.D. 425 (1915). **222.** People v. Dunbar, 194 A.D. 144 (1920). **223.** Wyles v. Gibbs, 1 Redf. Surr. 382 (1862). **224.** Kinzey v. Kinzey, 7 Daly 460 (1878). **225.** Jones v. Zoller, 29 Hun 551 (1883); later appeal, 32 Hun 280 (1884). **226.** Tyler v. Tyler, 80 Hun 406 (1894). **227.** Alixanian v. Alixanian, 28 M. 638 (1899). **228.** Circus v. Independent Order Ahawas Israel, 55 A.D. 534 (1900). **229.** Bailey v. Bailey, 45 Hun 278 (1887); affirmed, 142 N.Y. 632 (1894). **230.** People v. Hovey, 5 Barb. 117 (1849). **231.** Cropsey v. Ogden, 11 N.Y. 228 (1854). **232.** Haviland v. Halstead, 34 N.Y. 643 (1866). **233.** Roth v. Roth, 97 M. 136 (1916). **234.** Gardner v. Gardner, 98 M. 411 (1917). **235.** Moore v. Moore, 8 Abb. N.C. 171 (1877). **236.** Matter of Eichler, 84 M. 667 (1914). **237.** Matter of Estate of Ensign, 103 N.Y. 284 (1886). **238.** People v. Faber, 92 N.Y. 146 (1883); also, 1 N.Y. Cr. R. 115; reversing 29 Hun 320 (1883). **239.** Estate of Webb, 1 Tuck. Surr. 372 (1868). **240.** Ponsford v. Johnson, 2 Blatch. 51 (1847); also, Fed. Cas. No. 11,266.

241. Smith v. Woodworth, 44 Barb. 198 (1865). **242.** Peugnet v. Phelps, 48 Barb. 566 (1867). **243.** Van Voorhis v. Brintnall, 86 N.Y. 18 (1881); reversing 23 Hun 260 (1880). **244.** Thorp. v. Thorp, 90 N.Y. 602 (1882); reversing 47 Super. Ct. 80 (1881); also, 60 How. Prac. 295. **245.** Moore v. Hegeman, 92 N.Y. 521 (1883);

affirming 27 Hun 68 (1882). **246.** People v. Chase, 28 Hun 310 (1882). **247.** Stack v. Stack, 6 Dem. Surr. 280 (1887). **248.** Merriam v. Wolcott, 61 How. Pr. 377 (1881). **249.** Matter of Simms, 105 M. 118 (1918). **250.** Matter of Meehan, 150 A.D. 681 (1912). **251.** Fagin v. Fagin, 88 M. 304 (1914). **252.** Matter of Salvin, 106 M. 111 (1919). **253.** Price v. Tompkins, 108 M. 263 (1919); affirmed, 190 A.D. 967 (1920); prior hearing, 171 Supp. 844 (1918); affirmed, 186 A.D. 936 (1918). **254.** Matter of Tyrrell's Estate, 115 M. 714 (1921); affirmed, 190 Supp. 955. **255.** Matter of Tompkins, 207 A.D. 166 (1923). **256.** Matter of Hafner, 122 M. 277 (1924). **257.** Romps v. Romps, 209 A.D. 832 (1924). **258.** In re Stanton, 123 Supp. 458 (1910). **259.** Jackson v. Winne, 7 Wend. 47 (1831). **260.** Barker v. Barker, 88 M. 300 (1914).

261. Everett v. Morrison, 69 Hun 146 (1893). **262.** Dorgeloh v. Murtha, 92 M. 279 (1915). **263.** Henry v. Henry, 4 Dem. Surr. 253 (1886). **264.** Ostro v. Ostro, 169 A.D. 790 (1915). **265.** Ferlat v. Gojon, Hopk. Ch. 478 (1825). **266.** Sloan v. Kane and Grant, 10 How. Pr. 66 (1854). **267.** Fisk v. Fisk, 6 A.D. 432 (1896); affirming 12 M. 466 (1895); also, 25 Civ. Proc. R. 38. **268.** Wendel v. Wendel, 30 A.D. 447 (1898); reversing 22 M. 152 (1897). **269.** Clarke v. Clarke, 11 Abb. Pr. 228 (1860). **270.** Berus v. Berus, 83 M. 624 (1914). **271.** Bahrenburg v. Bahrenburg, 88 M. 272 (1914); affirmed, 172 A.D. 950 (1916). **272.** Pellerin v. Pellerin, 123 M. 552 (1924). **273.** Minner v. Minner, 238 N.Y. 529 (1924); reversing 208 A.D. 820. **274.** Glinsmann v. Glinsmann, 12 How. Pr. 32 (1855). **275.** Shrady v. Logan, 17 M. 329 (1896). **276.** Glean v. Glean, 70 A.D. 576 (1902). **277.** Scott v. Shufeldt, 5 Paige 43 (1835). **278.** Montgomery v. Montgomery, 3 Barb. Ch. 132 (1848). **279.** Barth v. Barth, 5 Month. L. Bul. 85 (1883). **280.** Fontana v. Fontana, 77 M. 28 (1912).

281. Bange v. Bange, 46 M. 196 (1905). **282.** Tait v. Tait, 3 M. 218 (1893). **283.** Kujek v. Goldman, 150 N.Y. 176 (1896); affirming 9 M. 34 (1894); also, 31 Abb. N.C. 314; affirming 5 M. 360 (1893). **284.** Gumbiner v. Gumbiner, 72 M. 211 (1911). **285.** Riley v. Riley, 73 Hun 575 (1893). **286.** Meyer v. Meyer, 49 How. Pr. 311 (1875). **287.** Jacobson v. Jacobson, 207 A.D. 238 (1923). **288.** O'Connell v. O'Connell, 201 A.D. 338 (1922). **289.** Klein v. Wolfsohn, 1 Abb. N.C. 134 (1876). **290.** Keyes v. Keyes 6 M. 355 (1893). **291.** King v. Brewer, 8 M. 587 (1894); also, 31 Abb. N.C. 325. **292.** Harris v. Harris, 201 A.D. 880 (1922); facts appearing in 201 A.D. 342. **293.** Sheridan v. Sheridan, 186 Supp. 470 (1921). **294.** Robertson v. Cowdrey, 2 West. L.J. 191 (1843). **295.** Hides v.

Hides, 65 How. Pr. 17 (1883). **296.** Truiano v. Truiano, 121 M. 635 (1923). **297.** Muller v. Muller, 21 Weekly Dig. 287 (1885). **298.** Blank v. Blank, 107 N.Y. 91 (1887). **299.** Colt v. O'Connor, 59 M. 83 (1908). **300.** Schaeffer v. Schaeffer, 160 A.D. 48 (1913); motion for leave to appeal denied, 161 A.D. 887 (1914).

301. Griffin v. Griffin, 122 M. 837 (1924); affirmed, 209 A.D. 883 (1924). **302.** Di Lorenzo v. Di Lorenzo, 174 N.Y. 467 (1903); reversing 71 A.D. 509 (1902); which reversed 34 M. 692 (1901). **303.** Robert v. Robert, 87 M. 629 (1914). **304.** Moore, v. Moore, 94 M. 370 (1916). **305.** Weill v. Weill, 104 M. 561 (1918). **306.** Smith v. Smith, 112 M. 371 (1920). **307.** Beckermeister v. Beckermeister, 170 Supp. 22 (1918). **308.** Schachter v. Schachter, 109 M. 152 (1919). **309.** Rubinson v. Rubinson, 110 M. 114 (1920). **310.** Watkins v. Watkins, 197 A.D. 489 (1921). **311.** Rosza v. Rosza, 117 M. 728 (1922). **312.** Warren v. Warren, 199 Supp. 856 (1923). **313.** Domschke v. Domschke, 138 A.D. 454 (1910). **314.** Libman v. Libman, 102 M. 443 (1918). **315.** Randazzo v. Roppolo, 105 Supp. 481 (1906). **316.** Houle v. Houle, 100 M. 28 (1917); 166 Supp. 615. **317.** Matter of Moncrief, 235 N.Y. 390 (1923); reversing 203 A.D. 893 and 118 M. 98 (1922). **318.** Turk v. Salmon, 5 Month. L. Bul. 83 (1883). **319.** Anderson v. Anderson, 74 Hun 56 (1893); affirmed, 147 N.Y. 719 (1895). **320.** Fratello v. Fratello, 118 M. 584 (1922).

321. Sherman v. Sherman. 47 St. Rep. 404 (1892); also, 20 Supp. 414. **322.** Steimer v. Steimer, 37 M. 26 (1902). **323.** Butler v. Butler, 204 A.D. 602 (1923); appeal dismissed, 236 N.Y. 642 (1923). **324.** Vazakas v. Vazakas, 109 Supp. 568 (1908). **325.** People v. Racykowski, 28 Cr. Rep. 366 (1912); also, 29 Cr. Rep. 533. **326.** Winslow v. Winslow, 6 Abb. Pr. 294 (1858). **327.** Ryer v. Ryer, 67 How. Pr. 369 (1884). **328.** Roberts v. Ogdensburgh and L. C. R.R. Co., 34 Hun 324 (1884). **329.** Matter of Denick, 92 Hun 161 (1895). **330.** Goodwin v. Goodwin, 158 A.D. 171 (1913); affirming 80 M. 303 (1913). **331.** Matter of Bruyn, 17 M. 481 (1895). **332.** Sullivan v. Sullivan, 209 A.D. 910 (1924); reversing 122 M. 104 (1923); affirmed, 239 N.Y. 599 (1924). **333.** Marshall v. Marshall, 2 Hun 238 (1874); also, 4 T. and C. 449. **334.** Campbell v. Crampton, 2 Fed. 417 (1880). **335.** Matter of Hall, 61 A.D. 266 (1901). **336.** Matter of Salmon, 34 M. 251 (1901). **337.** Kerrison v. Kerrison, 60 How. Pr. 51 (1880); also, 8 Abb. N.C. 444. **338.** People ex rel. Scharff v. Frost, 198 N.Y. 110 (1910); affirming 135 A.D. 473 (1909); affirming 116 Supp. 946 (1909).

NORTH CAROLINA

REFERENCES: Consolidated Statutes of North Carolina (two volumes), 1919; Supplement, 1924; Public Laws of North Carolina, 1924, 1925 (or as compiled in Cumulative Statutes, 1925), 1927; Reports through Volume 192.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Consolidated Statutes, unless the Supplement thereto is specifically cited, and to session laws amending them, the amended and added provisions being available also in the Cumulative Statutes. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this North Carolina section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—No officiant shall perform a ceremony of marriage until there is delivered to him a license for the marriage of the persons (2498). *A marriage solemnized without a license is nevertheless valid for every purpose* (*1, 2*).

b. Issuer.—License is issued by the register of deeds of the county in which the marriage is to take place or by his deputy (2498; 2500).

c. Compensation of Issuer.—For issuing marriage license the register of deeds shall be allowed $1.00 (3906). [There is no statutory provision in the public laws providing the register with a salary or requiring him to turn over the fees collected (3207).—G.M.] [Note: There is a state tax of $3.00 on marriage licenses, paid to the register of deeds, and counties may levy $1.00 on marriage licenses (P.L. 1925, ch. 101, §90). The levy by the county is the same fee as is authorized in §3906.—G.M.]

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—All unmarried persons of sixteen years or upwards may lawfully marry, and females between fourteen and

sixteen years may marry under a special license issued by the register of deeds after the written consent of a parent or guardian of the female has been filed with him, the fact of the filing of which shall be set out in such license (Sup. 2494). [As to under-aged marriages in cases of carnal relations, see Sup. 4209a under 7.] [The Attorney General has held that, all statutory requirements concurring, the register has no authority to refuse such special license.—G.M.] The marriage of a male under sixteen or of a female under fourteen years shall be void (2495). *A marriage of a person below the age of consent is void only when so declared by a proper court (3). The purpose of the statute being merely to raise the common law ages (4), the marriage of a person under the established age, if otherwise valid, may be confirmed by subsequent consent and cohabitation after attaining such age (3, 4). The marriage of a girl of the established age being valid notwithstanding lack of parental consent (5), the parent cannot recover for loss of services caused by the minor's marriage (6). Penalty.* Any person marrying a female under fourteen years is guilty of a misdemeanor (4444). [As to punishment for misdemeanors, see 4173 under 1k; as to penalty on issuer, see 2503 under 1k.] *The penal statute does not itself declare void the marriage of a girl of proper age but only subjects the husband to penalty (7).*

g. Parental Consent.—The register shall not issue a license for the marriage of a party under eighteen years until delivery to him of the written consent of the father, mother, or guardian with whom such minor resides, which consent shall be filed by the register (2500). *Penalties.* Every register knowingly and without reasonable inquiry issuing a license without the required consent where either party is under eighteen years shall forfeit $200 to any parent or guardian who sues therefor (2503). Any person obtaining a license for the marriage of persons under eighteen by misrepresentation or false pretenses shall be fined not exceeding $50, imprisoned not exceeding thirty days or both (2501). *The remedy of suing for the penalty provided in §2503 is exclusive (6, 8), requires action to be brought in the name of the parent, not of the state, and allegation that the register acted knowingly and without reasonable inquiry (9), and does not subject to liability the sureties on the register's official bond (10, 11). Written consent is a condition precedent to license issuance, and any later consent would not relieve the issuer from penalty (12). Inasmuch as the statute fixes the order of importance of those who may give consent, if the minor lives with both parents the consent of the mother alone does not suffice, and the issuer is liable for failure to ascertain the father's custody (13). But the father being dead, the mother's consent suffices regardless of a stepfather*

(14). "Reasonable inquiry" is such as a business man, acting in the important affairs of life, would make (15, 16) eliminating the probability of the existence of a legal impediment (17, 18). What constitutes reasonable inquiry is a question of law for the court (19, 20, 21, 22) unless the evidence is conflicting (23). The decision rests upon such circumstances as the register's acquaintance with the applicant (16, 18, 20, 21, 24, 25, 26, 27, 28, 29), his knowledge of such person's character (17, 19, 21, 27, 29, 30, 31), the availability of the parent for purpose of inquiry (25, 26, 27, 28), the requirement of an affidavit (20, 31), and surrounding circumstances, such as time of application or basis of alleged knowledge (27, 32). The register is personally liable for neglect of a deputy to make reasonable inquiry (2, 30).

h. Mental and Physical Qualifications.—The register shall issue no license to an applicant except upon presentation of a certificate executed within seven days, showing that tuberculosis in the infectious stages does not exist and that the applicant has not been adjudged idiot, imbecile, or of unsound mind or, if a male, that he is not infected with any venereal disease (2500a). Such certificate shall be executed by some reputable physician licensed to practice in the state and residing in the county in which the license is applied for, or by the county health officer whose duty it shall be to examine such applicants and issue such certificate without charge, and a physician residing outside the county in which the marriage is to take place may issue such certificate when the clerk of the superior court certifies that the person signing is a reputable physician; a physician resident in a city or town situated in two counties may issue certificates in either county (2500b, as amended P.L. 1927, ch. 240). *Penalties.* Any register issuing a license without presentation of the certificate shall be fined not less than $200 or imprisoned for thirty days (2500c). Any physician knowingly making any false statement in the certificate shall be fined not less than $200 or imprisoned for not more than six months (2500d).

All marriages between persons either of whom is incapable of contracting for want of will or understanding are void (2495). *Idiocy and lunacy being an insuperable impediment to marriage (33) and making a marriage absolutely void, refusal of a decree of nullity is not within the discretion of the court (34) or ratification within the power of the parties by cohabitation after restoration to sanity (35). But a judicial declaration of invalidity may be convenient (33). It has been held, however, that the nullity of a marriage of an imbecile may not be shown collaterally in an indirect action but only directly (36) during the*

lives of the parties (37), and that such marriage, though subject to a declaration of nullity ab initio, is not void ipso facto and will not be set aside on action of the competent party who long cohabited with the other, and had children, knowing all the facts (38).

Absolute divorce may be granted where the wife at the time of marriage was pregnant and the husband was ignorant of the fact and not the cause thereof (Sup. 1659). *Prior to the enactment of this statute concealed pregnancy at the time of marriage did not allow of annulment for fraud (39, 40) unless the child of a white woman with a white husband proved to be mulatto (41). Unknown illicit intercourse prior to marriage not resulting in pregnancy does not allow of annulment (42, 43).*

i. Form of License.—The license is addressed to any authorized officiant, sets forth the names, residence, age, race, and parentage of the parties; whether the parents are living, and their residence; parental consent, if required; and the absence of legal impediment; and authorizes the solemnization within the county within sixty days, stating the provision for the return of the certificate by the officiant (2502).

j. Record of License.—The register shall enter in a book the substance of each marriage license and return, preserving the original license and return (2504). *Penalty.* Any register failing to record the substance of any license issued by him shall forfeit $200 to any person suing (2505). [Note: The written consent of the parent or guardian of a minor shall be filed and preserved by the register (2500).] *Even if signed, a license is not "issued" until filled out and handed to the applicant, and if at that time the register who signed it is out of office, he is not liable for failure to record (9). The penalty for failure to record is in the alternative, applicable to failure to record the substance of the license or failure to record the return (2).* [See 3b.]

k. Other Provisions.—When it appears probable that there is a legal impediment to the marriage, the register has power to administer to the applicant an oath touching the legal capacity of the parties to contract marriage (2500). *Administration of an oath is discretionary with the register (21). Penalties.* Every register knowingly or without reasonable inquiry, either personally or by deputy, issuing a license where there is a lawful impediment shall forfeit $200 to any parent or guardian who sues therefor (2503). Any register knowingly issuing a license for the intermarriage of a colored and a white person is guilty of a misdemeanor (4341). [Note: Misdemeanors are pun-

ishable as at common law; except where infamous or with intent to defraud, then by imprisonment of from four months to ten years, or by fine (4173).]

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by an ordained minister of any religious denomination, or minister authorized by his church, by a justice of the peace, or among Quakers according to their custom (2493). [Note: Marriages solemnized before 1909 by ministers of the gospel, licensed but not ordained, are validated (2493).] *The statute does not require the minister to be in charge of any particular congregation so long as he is authorized by the rules of his church to solemnize marriages (44), or to depend upon the ministry for financial support (45, dictum). A marriage celebrated by a person not authorized is a nullity (46).*

b. Officiant's Credentials.—No provision.

c. Presentation of License.—No officiant shall perform a ceremony until there is delivered to him a license for the marriage of the parties (2498). *Penalty.* Every officiant marrying a couple without a license first being delivered to him or after the expiration of such license [see 2502 under 1i] shall forfeit $200 to any person suing therefor and shall also be guilty of a misdemeanor (2499). [As to punishment for misdemeanors, see 4173 under 1k.] *Actual physical delivery of the license to the officiant before the ceremony is necessary to protect against penalty, not a mere assurance and later delivery (47). Formerly the officiant was liable to a civil penalty only (48). Notwithstanding the penalty on the officiant solemnization without a license creates a valid marriage (1, 2).*

d. Form of Ceremony.—The consent of the parties, legally competent, presently to take each other as husband and wife, freely, seriously, and plainly expressed by each in the presence of the other and in the presence of an authorized officiant, and the declaration by such officiant that the parties are man and wife, shall be a valid marriage; but the rite of marriage among Quakers according to their custom shall not be interfered with (2493). [Note: The certificate of marriage must be signed by one or more witnesses to the ceremony (2502) and on the record of marriages shall be put the names of all or at least three witnesses present at the marriage (2504).] *There is but one law of marriage in this state, applying as well to Indians as to white persons (49).*

e. Common Law Marriage.—No statutory provision. *The legislation of this state has always required for a legal marriage a solemnization by a person in a sacred office or public station (50): there is here no such thing as a marriage simply by consent (46), and a marriage performed by a person without authority is void for want of solemnization (51).*

f. Irregular Solemnization.—No statutory provision. *A private citizen personating an ordained minister and solemnizing a marriage with consent of the parties commits no offense known to the common or statute law (52). A conspiracy to procure a woman to submit to sexual relations by fraudulent representations that the officiant of a sham marriage has authority to solemnize a marriage is a conspiracy to do an unlawful act and indictable (46).*

g. Other Provisions.—*Penalty.* Any officiant knowingly joining in marriage any colored and white person shall be guilty of a misdemeanor (4341). [As to punishment for misdemeanors, see 4173 under 1k.]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant is required to return the license to the issuer within sixty days after celebration with his signature subscribed to the certificate under the license and with the blanks therein filled out (2502). *Penalty.* Every officiant failing to return such license and certificate to the register within two months shall forfeit $200 to any person suing therefor and shall also be guilty of a misdemeanor (2499; 2502). [As to punishment for misdemeanors, see 4173 under 1k.]

b. Local Record.—Every register shall enter in a book the substance of each marriage license and return and shall file the original license and return (2504). *Penalty.* Any register failing to record the substance of any return within ten days after the return is made shall forfeit $200 to any person who sues therefor (2505). [*See* 1j.] *The legislature can take away this right to a penalty in a specific case (53).* [Note: All cities have the power to require the registration of marriages (Sup. 2787, subsection 22).]

c. State Record.—No provision.

d. Evidence.—Copies of official records of any public office shall be competent evidence when properly certified by the keeper thereof (1779). *A marriage may be presumed or even proved by a certified*

copy of a marriage license and return (54, 55). The original marriage license signed by the officiant and the record book of marriages for the county are admissible without the testimony of the makers thereof (56). A contract of marriage signed by the parties themselves in a foreign country is itself substantive evidence of marriage; a certificate of a foreign marriage signed by the officiant is part of the res gestae, *admissible in support of oral testimony (57).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. The marriage of persons nearer of kin than first cousins shall be void, and double first cousins shall not marry (2495). *The legislature can legalize marriages within the forbidden degrees (58).* [Note: Half blood relationship is the same as whole blood except as to marriages heretofore contracted (2496). *Even without this statute relations of a man with the daughter of his half-sister were incestuous (59).*] *Penalty.* Carnal intercourse between ancestors and descendants and brothers and sisters is punishable by imprisonment not exceeding fifteen years, and between uncles and nieces, aunts and nephews is punishable in the discretion of the court (4337, 4338). [Inasmuch as marriages between such relatives are void, carnal intercourse based on such marriages would be similarly punishable. The marriage of first cousins being void, intercourse thereunder would be punishable as lewd and lascivious cohabitation, which is a misdemeanor (4343). As to punishment for misdemeanors, see 4173 under 1k.—G.M.]

b. Proper Civil and Racial Status.—All marriages between a white person and a Negro or person of Negro descent to the third generation inclusive are forever prohibited (Const. Art. XIV, §8). All marriages between a white person and a person of Negro or Indian descent to the third generation inclusive, or between a Cherokee Indian of Robeson County and a person of Negro descent to the third generation inclusive, are void (2495). *Penalties.* All marriages between a white person and a person of Negro descent to the third generation inclusive are forever prohibited and shall be void, and any person violating this shall be imprisoned for from four months to ten years and may also be fined (4340). [As to penalties for license issuance and solemnization, see 4341 under 1k and 2g. As to punishment for cohabitation under a void marriage between a white person and an Indian or between a Cherokee Indian of Robeson County and a Negro, see 4343 under 4a.] *The marriage of a white person and a person of color is void (60, 61, 62) so long as a great-*

grandparent of the colored person was a pure Negro (63, 64). This prohibition of miscegenetic marriages, applying equally to both races, was not affected by amendments to the federal Constitution or by the Civil Rights Bill (65, 66). The law of North Carolina creates a personal incapacity in colored and white domiciliaries to intermarry in any other state (67). [See 6.]

c. Proper Legal Status.—All marriages between persons either of whom has a spouse living at the time thereof shall be void (2495), and any person being married who shall marry any other person or cohabit with such other in this state shall be imprisoned for from four months to ten years, unless the spouse shall have been continually absent from such person for the seven years preceding and shall not have been known to him to have been living within that time, or unless the former marriage has been dissolved or declared void (4342). *The marriage of a person already married is void (68, 69, 70, 71), creates no marital rights, and is subject to collateral attack (69), even if one believes oneself divorced, the decree being in fact void (68), or even if the earlier spouse has been absent more than seven years and the remarriage is thus not bigamous (70). This is not true, of course, if the prior marriage was itself void ab initio (72). Absence of a spouse for the required period does not justify remarriage of the other, at least not without inquiry as to the continuance of the absentee's life, if he himself caused such absence (73).* After judgment of absolute divorce either party may marry again unless otherwise provided by law (1663). *Under a former statute remarriage of the guilty party to a divorce was prohibited and considered bigamous (74, 75).*

d. Proper Consent of Parties.—Consent of the parties presently to take each other as husband and wife, freely, seriously, and plainly expressed, is necessary to a valid marriage (2493). *Cohabitation on an understanding that the relation can cease at the will of the parties does not constitute marriage (49). Consummation is not necessary to the validity of a marriage actually contracted (76).* All marriages between persons either of whom is incapable of contracting from want of will shall be void (2495). *The fraud necessary to allow of divorce must be such misrepresentations as would deceive a person of ordinary prudence (39, 41). There can be no fraud where the person supposedly deceived had knowledge of the untruth (39) or where the person making the false statement had no knowledge of its untruth (40). Though the statute does not make fraud a ground for divorce (40), dissolution of a marriage might be allowed for fraudulent concealment of illicit incestuous intercourse before marriage (42) and has been allowed a white*

man induced to marry a white woman upon her representations of her virtue and his paternity of her child when the child has proved to be mulatto (41). But a man who has had antenuptial relations with a woman and has married upon her false representations that he is the cause of her pregnancy may be barred from action by "contributory negligence" (43). A marriage procured by force and not ratified is void ab initio, at least after a court decree of nullity (72). But the duress necessary for a dissolution of marriage cannot be founded upon legal compulsion to discharge a legal duty, such as arrest for seduction (77) or threats thereof, or upon threats of violence, with no overt act, when legal protection was available (43).

5. STATE SUPERVISION

No provision.

6. INTERSTATE RELATIONS

No statutory provision. *Even though a marriage is generally valid everywhere if valid where contracted (78, 79), the law of the domicil can create a personal incapacity in the parties to contract a marriage in evasion thereof (67, 74), which incapacity continues so long as the domicil remains unchanged (67). When residents of this state go elsewhere to contract a marriage with no intent to return, there is no evasion of the laws of this state and the marriage is valid (79). Though this state has no jurisdiction to declare criminal as bigamous a marriage contracted outside the state (80, 81, 82), it may make criminal the cohabitation here after a bigamous marriage elsewhere (83).*

7. SEX OFFENSES AND MARRIAGE

Marriage between the parties shall be a bar to further prosecution for seduction (4339). Marriage of the offenders shall bar further prosecution for obtaining carnal knowledge of virtuous girls between twelve and sixteen years or of boys under sixteen years (Sup. 4209), in which case the consent of parents shall not be necessary (Sup. 4209a).

NORTH CAROLINA CASES

1. State v. Robbins, 28 N.C. 23 (1845). **2.** Maggett v. Roberts, 112 N.C. 71 (1893). **3.** State v. Parker, 106 N.C. 711 (1890). **4.** Koonce v. Wallace, 52 N.C. 194 (1859). **5.** Little v. Holmes, 181 N.C. 413 (1921). **6.** Wilkinson v. Dellinger, 126 N.C. 462 (1900).

7. Shutt v. Carloss, 36 N.C. 232 (1838). **8.** State v. Snuggs, 85 N.C. 541 (1881). **9.** Maggett v. Roberts, 108 N.C. 174 (1891). **10.** Holt v. McLean, 75 N.C. 347 (1876). **11.** Moretz v. Ray, 75 N.C. 170 (1876). **12.** Coley v. Lewis, 91 N.C. 21 (1884). **13.** Littleton v. Haar, 158 N.C. 566 (1912). **14.** Owens v. Munden, 168 N.C. 266 (1915). **15.** Savage v. Moore, 167 N.C. 383 (1914). **16.** Trolinger v. Boroughs, 133 N.C. 312 (1903). **17.** Bowles v. Cochran, 93 N.C. 398 (1885). **18.** Williams v. Hodges, 101 N.C. 300 (1888). **19.** Joyner v. Roberts, 114 N.C. 389 (1894). **20.** Harcum v. Marsh, 130 N.C. 154 (1902).

21. Furr v. Johnson, 140 N.C. 157 (1905). **22.** Spencer v. Saunders, 189 N.C. 183 (1925). **23.** Lemmons v. Sigman, 181 N.C. 238 (1921). **24.** Morrison v. Teague, 143 N.C. 186 (1906). **25.** Laney v. Mackey, 144 N.C. 630 (1907). **26.** Joyner v. Harris, 157 N.C. 295 (1911). **27.** Gray v. Lentz, 173 N.C. 346 (1917). **28.** Julian v. Daniels, 175 N.C. 549 (1918). **29.** Snipes v. Wood, 179 N.C. 349 (1920). **30.** Cole v. Laws, 104 N.C. 651 (1889) and 108 N.C. 185 (1891). **31.** Walker v. Adams, 109 N.C. 481 (1891). **32.** Agent v. Willis, 124 N.C. 29 (1899). **33.** Johnson v. Kincade, 37 N.C. 470 (1843). **34.** Crump v. Morgan, 38 N.C. 91 (1843). **35.** Sims v. Sims, 121 N.C. 297 (1897). **36.** Williamson v. Williams, 56 N.C. 446 (1857). **37.** State ex rel. Setzer v. Setzer, 97 N.C. 252 (1887). **38.** Watters v. Watters, 168 N.C. 411 (1915). **39.** Scroggins v. Scroggins, 14 N.C. 535 (1832). **40.** Long v. Long, 77 N.C. 304 (1877).

41. Barden v. Barden, 14 N.C. 548 (1832). **42.** Steel v. Steel, 104 N.C. 631 (1889). **43.** Bryant v. Bryant, 171 N.C. 746 (1916). **44.** State v. Bray, 35 N.C. 289 (1852). **45.** In the matter of Cunninggim, 60 N.C. 392, 397 (1864)—also 1 Winston 467. **46.** State v. Wilson, 121 N.C. 650 (1897). **47.** Wooley v. Bruton, 184 N.C. 438 (1922). **48.** State v. Loftin, 19 N.C. 31 (1836). **49.** State v. Ta-Cha-Na-Tah, 64 N.C. 614 (1870). **50.** State v. Samuel, 19 N.C. 177 (1836). **51.** Cooke v. Cooke, 61 N.C. 583 (1868). **52.** State v. Brown, 119 N.C. 825 (1896). **53.** Bray v. Williams, 137 N.C. 387 (1905). **54.** State v. Davis, 109 N.C. 780 (1891). **55.** Witty v. Barham, 147 N.C. 479 (1908). **56.** State v. Melton, 120 N.C. 591 (1897). **57.** State v. Behrman, 114 N.C. 797 (1894). **58.** Baity v. Cranfill, 91 N.C. 293 (1884). **59.** State v. Harris, 149 N.C. 513 (1908). **60.** State v. Fore, 23 N.C. 378 (1841).

61. State v. Watters, 25 N.C. 455 (1843). **62.** State v. Hooper, 27 N.C. 201 (1844). **63.** Ferrall v. Ferrall, 153 N.C. 174 (1910). **64.** Hare v. Board of Education, 113 N.C. 9 (1893). **65.** State v.

Hairston and Williams, 63 N.C. 451 (1869). **66.** State v. Reinhardt and Love, 63 N.C. 547 (1869). **67.** State v. Kennedy, 76 N.C. 251 (1877). **68.** Irby v. Wilson, 21 N.C. 568 (1837). **69.** Gathings v. Williams, 27 N.C. 487 (1845). **70.** Ward v. Bailey, 118 N.C. 55 (1896). **71.** Burleson v. Stewart, 180 N.C. 584 (1920). **72.** Taylor v. White, 160 N.C. 38 (1912). **73.** State v. Goulden, 134 N.C. 743 (1904). **74.** Williams v. Oates, 27 N.C. 535 (1845). **75.** Calloway v. Bryan, 51 N.C. 569 (1859). **76.** State v. Patterson, 24 N.C. 346 (1842). **77.** State v. Davis, 79 N.C. 603 (1878). **78.** State v. Schlachter and Witle, 61 N.C. 520 (1868). **79.** State v. Ross, 76 N.C. 242 (1877). **80.** State v. Barnett, 83 N.C. 615 (1880). **81.** State v. Cutshall, 110 N.C. 538 (1892). **82.** State v. Ray, 151 N.C. 710 (1909). **83.** State v. Moon, 178 N.C. 715 (1919).

NORTH DAKOTA

REFERENCES: Compiled Laws of North Dakota, 1913 (two volumes); Supplement, 1913–1925; Laws of North Dakota, 1927; Reports through Volume 53.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Compiled Laws, unless specifically citing the sections of the Supplement, and to session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this North Dakota section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—No person shall solemnize a marriage until the parties thereto shall procure a license (4361).

b. Issuer.—License is issued by the county judge of the county in which either party resides or, if such county is unorganized, of the county to which it is attached for judicial purposes (4361). [Note: All marriages solemnized before 1909 where licenses have been issued by the clerk of the county court are valid (9730).] [As to affidavits before notary public, see 4362 under 1d.]

c. Compensation of Issuer.—For each license and record required the county judge shall collect from the applicant $1.00 (4364). County judges receive salaries regulated by the population of their counties (Sup. 3551a2; 8973; L. 1927, ch. 115). *Provision for salary having existed prior to imposition upon the county judge of the duty of marriage license issuance, fees for issuing licenses and certified copies of records belong to the judge in addition to his salary (1).*

d. Personal Appearance by Candidates.—The issuing judge shall examine the applicant upon oath, but inquiries and affidavits made before notaries public or other authorized officers, if deemed sufficient by the judge, may be substituted for oaths taken personally before him (4362). [See also that part of 4362 under 1k.]

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—Males of eighteen and females of fifteen years or upwards are capable of consenting to and consummating marriage (4358). No license shall be issued unless the female be over fifteen years (4375). [There is no statutory provision as condition to license issuance to males.] *Penalties.* See 4378 and 9727 under 1k. Annulment may be granted when the applicant therefor was under the legal age of consent and the marriage was contracted without the consent of the parent or guardian, unless after attaining that age such party freely cohabited with the other (4368), action being brought by the party under age within four years after arriving at the age of consent or by the parent or guardian before such arrival (4369).

g. Parental Consent.—A license shall not be issued for the marriage of a male under twenty-one or female under eighteen years without the consent of the parents or guardian, if there be any (4358), personally given or certified in writing signed by such parent or guardian and attested by two witnesses, one of whom shall make oath before the issuer that he saw the parent or guardian sign the certificate (4362), and unless such consent is obtained the county judge shall require before license issuance an affidavit of some disinterested, credible person showing that the female is over eighteen and the male over twenty-one years, which affidavit may be subscribed and sworn to before any person authorized to administer oaths (4375). *Penalties.* [See 4378 under 1k.] Anyone knowingly swearing falsely to the statements contained in the affidavit is guilty of perjury (4375), punishable by imprisonment of from one to five years (9375). [As to annulment in absence of parental consent, see 4368 and 4369 under 1f.]

h. Mental and Physical Qualifications.—No woman under forty-five years or man of any age, unless marrying a woman over forty-five, shall marry or intermarry within this state who is a common drunkard, habitual criminal, epileptic, imbecile, idiot, feeble-minded or insane person, or who has theretofore been afflicted with hereditary insanity or is afflicted with pulmonary tuberculosis in its advanced stages or with any contagious venereal disease (4373). The county judge before license issuance shall require an affidavit of some disinterested, credible person, sworn to before any person authorized to administer oaths, showing that the parties are not habitual criminals, and from each party an affidavit of a duly licensed physician other than the applicant showing as to the male that he is not afflicted with any contagious venereal disease and as to both parties that they

are not within the other conditions named in §4373 (4375). [Note: For making the examination and affidavit a physician may charge a fee not exceeding $2.00 (4377).] A license shall not be issued to one under the influence of an intoxicating liquor at the time of making application (4376). *Penalties.* See 4378 under 1k and 4375 and 9375 under 1g. The marriage of a person of unsound mind may be annulled—in an action brought by the party injured or by a relative or guardian of the party of unsound mind before the death of either party (4369)—unless after coming to reason such party freely cohabited with the other as husband or wife (4368).

i. Form of License.—The marriage license and certificate of the officiant shall be upon one blank form, the license, signed, sealed, and dated by the county judge and addressed to the officiant, showing the names, residences, and ages of the parties and requiring return within thirty days (4363).

j. Record of License.—The issuer shall keep a copy of all marriage licenses issued (4364) and shall file all papers and records pertaining to such licenses (4362). *Penalty.* Every county judge neglecting to record any marriage license as prescribed is punishable by fine of from $50 to $500 (9727).

k. Other Provisions.—The issuer upon application for a license shall inquire of the applicant upon oath as to the legality of the marriage and may examine other witnesses upon oath, and if satisfied that no legal impediment exists, shall issue the license and affix his seal (4362). If it appear in an affidavit under oath, which each contracting party is required to file with the county judge upon application for license, that either party has been divorced, the judge shall require a certified copy of the decree or decrees of divorce to be filed with the application (Sup. 4362a1), and no license shall be issued which in any manner would contravene any provision of such decrees (Sup. 4362a2). *Penalties.* Any county judge signing or issuing a marriage license except as prescribed by law is punishable by fine of from $50 to $500 (9727). Any person violating any provision of this article regulating marriages [§§4373–4378], or knowingly swearing falsely to the statements contained in the affidavits mentioned in this act, shall be punished by fine of from $50 to $500, imprisonment not exceeding thirty days, or both (4378). Any county judge knowingly issuing a license for the marriage of a white person and a Negro shall be punished by imprisonment not exceeding two years, fine not exceeding $2000, or both (9584) [See 4b.]

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by all judges of courts of record and justices of the peace within their respective jurisdictions, by ordained ministers and priests of every church, and by the Society of Friends according to the form used in its meetings (4361).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—No person shall solemnize a marriage until the parties thereto produce a license (4361). *Penalty.* Any authorized officiant joining a person in marriage before the prescribed license is produced to him is punishable by fine of from $50 to $500 (9728).

d. Form of Ceremony.—The marriage certificate shall be signed by two witnesses to the ceremony in addition to the signature of the officiant (4361). Marriages solemnized by the Society of Friends according to its forms shall be valid (4361). Indians contracting marriage according to the Indian custom and cohabiting as man and wife shall be deemed legally married (4365).

e. Common Law Marriage.—Marriage is a personal relation arising out of a civil contract, which may be entered into only as provided by law (4357). *By this mandatory provision the legislature meant to abrogate common law marriages which, since 1890, are hence invalid (2). Where common law marriages are valid, the cohabitation necessary to raise the presumption of a contract must be matrimonial and the repute general (3).*

f. Irregular Solemnization.—No marriage otherwise lawful shall be void for want of authority of the officiant or issuance of the license by the clerk of the county court if the parties thereto, or one of them, shall believe it lawful (9730). *Penalty.* Any person attempting to join others in marriage without being legally authorized to do so is punishable by imprisonment of from ninety days to one year, fine of from $100 to $500, or both (9729).

g. Other Provisions.—No officiant shall unite in marriage persons either of whom is epileptic, imbecile, feeble-minded, or insane, a common drunkard or habitual criminal, or who is afflicted with pulmonary tuberculosis in its advanced stages or any contagious venereal disease, unless the female party is over forty-five years (4374). No marriage ceremony shall be performed when either party is under the influence of intoxicating liquor or narcotic drug (4376). *Penalties.*

[See 4378 under 1k.] Any authorized officiant knowingly solemnizing a marriage for any white person with a Negro shall be punished by imprisonment not exceeding two years, fine not exceeding $2000, or both (9585). [See 4b.]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant shall fill out and sign a certificate following the marriage license, giving his official title or ecclesiastical connexion, and within thirty days after marriage shall return license and certificate to the issuer with the signature of two witnesses to the ceremony in addition to his own (4361), showing the place and date of marriage (4363). *Penalty.* Every authorized officiant failing to execute the certificate as prescribed, or neglecting for thirty days after marriage to return such license and certificate to the issuer, is punishable by fine of from $50 to $500 (9728).

b. Local Record.—When a license with certificate properly executed is returned to the county judge, he shall record the certificate immediately following the record of the license (4364). *Penalty.* Any county judge neglecting for thirty days after return to record the license and certificate as prescribed is punishable by fine of from $50 to $500 (9727).

c. State Record.—In addition to record with the county judge all marriages contracted in the state after 1925 shall be registered with the State Registrar of Vital Statistics at the state capitol (Sup. 4378a1), the judge transmitting the license and certificate to the registrar as soon as he has recorded them (Sup. 4378a2) and the State Registrar recording and indexing the records and thereafter returning the license and certificate to the county judge (Sup. 4378a3). *Penalty.* See 4378 under 1k.

d. Evidence.—Books of record of licenses and certificates kept by the county judge, or copies of entries certified by him under seal, are evidence in all courts (4367). The State Registrar of Vital Statistics shall issue upon application a certified copy of the record of a marriage license and certificate which shall be prima facie evidence of the facts therein (Sup. 4378a3). *Certified copies of parish records from a foreign country are admissible only when the foreign law is proved to require such registration as an official duty, and entries of marriages in a family Bible may sometimes be acceptable evidence (3).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Such marriages are incestuous and absolutely void (4359). *Penalty.* Persons knowingly intermarrying within the forbidden degrees shall be imprisoned from one to ten years (9614).

b. Proper Civil and Racial Status.—The marriage of a white resident of this state with a Negro person—having one-eighth or more Negro blood (9583)—is unlawful and—if contracted after 1909 (9586)—shall be utterly null and void (9582). *Penalty.* Either party to such marriage or both parties shall be punished by imprisonment not exceeding ten years, fine not exceeding $2000, or both (9582). [As to penalties for license issuance and solemnization, see 9584 under 1k and 9585 under 2g.]

c. Proper Legal Status.—The marriage of a person having a former spouse living with whom a marriage still subsists is illegal and void from the beginning unless such former spouse was absent and believed by such person to be dead for five years immediately preceding (4360). *The marriage of a person whose spouse is living and not so absent is bigamous and absolutely void* (*4*). A marriage may be annulled when at the time thereof the former spouse of either party was living and the marriage with him subsisting (4368), action being brought by either party during the life of the other or by the former spouse (4369). *Penalty.* Every person marrying another when married to one who remains living is punishable by imprisonment of from one to five years (9610, 9612), except where the spouse has been absent for five successive years without being known to such person within that time to be living, has absented himself and remained continually without the United States for five years together, or has been sentenced to imprisonment for life, or the marriage has been annulled, dissolved, or declared void (9611).

Neither party to a divorce may marry except in accordance with the decree of the court granting the divorce, whose duty it is to specify if either party shall be permitted to marry, and if so, when, which decree may be modified to permit of marriage (4379). [As to refusal of license to marry in contravention of divorce decree, see 4362a2 under 1k.] *A remarriage within the forbidden period after divorce is neither void nor voidable* (*5*). [*A dissenting opinion asks how, if the statute does not declare public policy or delay the effect of the divorce as regards remarriage, is the provision to have any force.*]

d. Proper Consent of Parties.—Marriage is a personal relation arising out of a civil contract to which the consent of the parties

thereto is essential (4357). [As to prohibition of marriage of persons under the influence of liquor or drugs, see 4376 under 2g.] A marriage may be annulled when the consent of either party was obtained by fraud or force unless such party thereafter freely cohabits with the other as husband or wife (4368). *Misrepresentation of citizenship was not a fraud going to the essence of the marriage relation and allowing annulment even at a time when a woman lost American citizenship by marrying a foreigner* (*6*).

5. STATE SUPERVISION

No provision. [The State Registrar of Vital Statistics is required to prepare and supply all blanks and forms used in registering returns of births and deaths and otherwise carrying out the purposes of the article on "Vital Statistics" (451). The act of 1925, imposing upon him duty as to registration of marriages, is compiled under the division "Regulating Marriages." Quaere whether the state registrar furnishes blanks for registration of marriages.—G.M.]

6. INTERSTATE RELATIONS

Marriages valid where contracted are valid in this state (4366).

7. SEX OFFENSES AND MARRIAGE

Intermarriage of the parties before conviction of the defendant for seduction of an unmarried female under twenty years bars prosecution, and offer of marriage in good faith at any time before submission of the case to the jury requires acquittal (9576).

NORTH DAKOTA CASES

1. Sargent County v. Sweetman, 29 N.D. 256 (1915). **2.** Schumacher v. Great Northern Ry. Co., 23 N.D. 231 (1912). **3.** In re Peterson's Estate, 22 N.D. 480 (1912). **4.** Michels v. Fennell, 15 N.D. 188 (1906.) **5.** Woodward v. Blake, 38 N.D. 38 (1917). **6.** Kawabata v. Kawabata, 48 N.D. 1160 (1922).

OHIO

REFERENCES: General Code of Ohio (Throckmorton), 1926; Supplement (Baldwin's Ohio Code Service), including Ohio Laws, 1927; Reports through Volume 114 Ohio State, 21 Appellate, and 26 Nisi Prius (New Series).

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Code. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Ohio section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Previous to persons being joined in marriage notice thereof shall be published before the congregation on two different days of public worship, or a license must be obtained (11186).

b. Issuer.—License is obtained from the probate judge (and banns are published) in the county where the female resides (11186); where the probate judge himself is a party, from the judge of the court of common pleas of the same county (11194). [Note: Marriages contracted under licenses issued to soldiers by their commanding officer during the war with Germany are valid and may be recorded by the probate judge of the county where solemnized (11198-1).]

c. Compensation of Issuer.—For all services in connexion with issuance of a marriage license and recording, the probate judge shall collect $1.00 (1601), which fees shall be held as public moneys and paid over to the county treasury (2977; 2983), the judge receiving a salary (2992) as sole compensation (2296).

d. Personal Appearance by Candidates.—Each person for whom a marriage license is sought shall appear personally before the probate court and make application therefor, unless the judge is satisfied by the affidavit of a reputable physician practicing in the county that either party is unable by reason of illness to appear, in which case license may be granted upon application and oath of one party, the

other making an affidavit setting forth the information required (11188). *Penalties.* [See 11193 under 1k.] Whoever with intent to defraud falsely personates another before an issuer of marriage licenses shall be imprisoned from one to six years (12859).

e. Advance Notice and Objections.—No provision in relation to marriage licenses. [Note: If banns are resorted to in place of license, notice shall be published in the presence of the congregation on two different days of public worship, the first to be at least ten days before the marriage (11186).]

f. Minimum Age.—Males of eighteen and females of sixteen years may be joined in marriage (11181). In cases where pregnancy is established beyond doubt the juvenile court, having made one of the parties its ward, with consent of the wards or their parents may give consent in the probate court, and license may issue even though one of the parties is under the minimum age otherwise prescribed by law (11181-1). *The statute raises the common law age of consent, and though a marriage contracted below the statutory age—and above the common law age (1)—is void unless confirmed after attaining the statutory age (2, 3, 4), ratification thereof may be shown by cohabitation (5) or other acts in recognition of the relation (1, 3, 6). If an express disaffirmance of the under-age marriage were necessary, that would be adequately shown by the nonaged party's leaving the other and marrying a third person (2). The consent of the person under age is necessary to an action to annul his marriage for such want of age (7). An infant, though of the age of consent, is not bound by an executory contract to marry (8).*

g. Parental Consent.—Any person under twenty-one years (and not previously married) must first obtain the consent of his or her parents, surviving parent, or guardian (11181), given personally before the judge or certified in writing by two witnesses, one of whom must appear and make oath that he saw the parent or guardian subscribe or heard him acknowledge it (11190). If the parent or guardian is a non-resident of the county in which license must issue, he may appear personally before the judge of a court of record in the county of his domicil and give his written consent, which must be attested by two witnesses, certified by the judge, and forwarded to the probate judge of the county in which license must issue (11191). When a party is under age and has no parents or legal guardian the judge of the juvenile court of the county of the female's residence upon application of both parties may give consent to the marriage in

the probate court (11181-1). *Penalty.* See 11193 under 1k. [As to penalty for false personation of a parent, see 12859 under 1d. As to officiant satisfying himself as to parental consent where banns have been published, see 11197 under 2g.] *Parental consent, regardless of the requirement and of the penalty for its absence, is not essential to the validity of the marriage of a minor of the statutory age of consent (3, 5, 6). Want of parental consent does not even make void the marriage of a girl between the ages of twelve and sixteen (7). But it has been held where an immature girl of seventeen, whose mental poise had been disturbed, married a man under a license obtained by perjured evidence without parental consent, that annulment will be allowed if the marriage has not been consummated or recognized (9).*

h. Mental and Physical Qualifications.—No license shall issue when either applicant is a habitual drunkard, epileptic, imbecile, or insane person, or at the time of application is under the influence of intoxicating liquor or narcotic drug (11187). *Marriage being a contractual relation, want of mental capacity renders it ineffectual and void ab initio (4, 10, 11). Formal adjudication of insanity is prima facie evidence of the fact (12, 13): the marriage of one of seemingly sufficient mental capacity is not void because subsequent to commitment to guardianship for intemperance and inability to manage property (12), and one who has never in fact recovered after having been adjudged insane prior to marriage cannot ratify the marriage (14). Only premarital insanity is ground for court action: subsequent insanity does not allow of divorce (15). [As to concealment of pregnancy and incontinence constituting fraud, see* 4d.]

i. Form of License.—The license shall have printed on it the penalty for failure of the officiant to make return (11189). [See 11196 under 3a.]

j. Record of License.—The probate court shall enter the licenses, the names of the parties to whom issued, and of the applicants therefor, with a brief statement of the facts sworn to (1594).

k. Other Provisions.—Each applicant shall state upon oath his or her name—if bride was formerly married, also her married name—age, residence, birthplace, occupation, parents' names, including mother's maiden name, number of times he has been previously married, and name of the probable officiant; and if the judge is satisfied that no legal impediment exists he shall grant the license (11188). *Penalty.* A judge issuing or signing a marriage license in any manner other than as prescribed shall forfeit not exceeding $1000

to the party aggrieved (11193). *To protect himself from penalty where an impediment in fact exists the issuer should have to satisfy himself by taking the applicant's oath or affirmation (16). False swearing in an application as to the woman's residence or parental consent (17) or as to the number of times previously married is perjury (18). The oath must be administered by a person acting* de jure, *such as a deputy, even though a woman (19), and not by an unauthorized person (20).*

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by an ordained or licensed minister of any religious society within the state, who has obtained a license for that purpose, by a justice of the peace within his county—including the judge of the municipal court of Columbus (1558–51)—by a mayor of a city or village in any county in which such municipality wholly or partly lies, by the superintendent of the institution for the deaf and dumb, and by religious societies according to their rules (11182).

b. Officiant's Credentials.—A minister of the gospel, upon producing to the probate judge of any county in which he officiates, credentials of his being regularly ordained or licensed by any religious society shall be entitled to receive a license authorizing him to solemnize marriages within this state so long as he continues a regular minister (11183), and must produce his license so obtained to the probate judge of the county wherein he solemnizes a marriage, who shall enter the name of the minister upon record and note the county from which license issued (11184). *The word "gospel" does not restrict the right to Christian ministers nor ordination require any particular form so long as one has been appointed and recognized by one's denomination and is devoting oneself generally to the work of the religious society, but in order to obtain a license one must actually officiate as regular minister in a congregation in the county where the license is sought (21).*

c. Presentation of License.—*Penalty.* An authorized officiant solemnizing a marriage without banns having been published or license issued as required shall be fined not more than $1000 and imprisoned not more than six months (12921). [As to officiant being satisfied as to publication of banns, see 11197 under 2g.]

d. Form of Ceremony.—[No general provision.] The several religious societies may join persons in marriage according to their rules (11182).

e. Common Law Marriage.—No statutory provision. *A marriage valid at common law is valid in this state, notwithstanding statutory requirements, in the absence of a statute containing express words of nullity (22, 23, 24, 25). This has been only once doubted, and that by a lower court in a since disapproved case (26). A contract of present marriage openly made and followed by cohabitation as husband and wife creates a binding marriage (22, 23, 25, 27, 28, 29, 30, 31, 32) even if not made in the presence of witnesses (33, 34). But regardless of the validity of a marriage* per verba de praesenti, *a marriage* per verba de futuro cum copula *is not valid (35). A common law marriage may be established either by direct proof of a contract without evidence of cohabitation and repute (29) or by the presumption arising from evidence of acknowledgment, cohabitation, and reputation, and other conduct as husband and wife (29, 32, 33, 36). Any misgiving of a party as to the legality of a common law marriage is immaterial to its validity (31).*

Where parties unite in a ceremonial marriage in good faith believing themselves competent but one is then under a disability, after removal of the disability the continuance in the relation in good faith ratifies the former agreement and makes the parties husband and wife from the time of the removal of the impediment (27).

f. Irregular Solemnization.—*Penalty.* Whoever attempts to solemnize a marriage not being regularly authorized shall be fined $500 and imprisoned not more than six months (12922).

g. Other Provisions.—Before any officiant shall solemnize a marriage of a person who is required to obtain consent of his parent or guardian, except where license has been obtained, he must be satisfied that the marriage intention has been duly published and that the consent has been granted, either by acknowledgment in his presence or by certificate of the parent or guardian, attested by one or more credible witnesses who must be present (11197).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—Certificate of every marriage shall be transmitted forthwith to the probate judge in the county where the license was issued or where the congregation is situated wherein banns were published, or where the marriage was celebrated (11195). *Penalty.* An officiant or witnessing clerk[1] failing to transmit such certificate to the probate judge within thirty days after solemnization shall forfeit not exceeding $50 (11196).

[1] See Introduction, p. 24.

b. Local Record.—All certificates of marriage filed with the probate judge shall be recorded (1594; 11195) and indexed (1595).

c. State Record.—No provision.

d. Evidence.—In action for divorce proof of cohabitation and reputation of marriage is competent evidence (11989). *Though marriage records of the county are admissible in proof of marriage (37), properly authenticated records of a foreign country are not admissible unless proved to be made and kept according to the laws of such country (38). An alleged certificate of marriage in another state, signed by the officiant but not dated or recorded or shown to be made at the time of marriage, is not proper evidence in a criminal prosecution (39).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (11181). *Penalty.* Whoever knowing themselves to be nearer of kin by consanguinity or affinity than cousins commit adultery or fornication together shall be imprisoned from one to ten years (13023). *Sexual commerce between persons within the forbidden degrees is made criminal regardless of marriage between them (40). The relation of uncle and niece is nearer than that of cousins (40). Though degrees of relationship by affinity are reckoned like those of consanguinity, and a brother-in-law and sister-in-law are within the incest statute (41), affinity includes only the blood relatives of one's spouse, not those related to one's spouse by marriage (42), and ceases with the dissolution of the marriage creating it (43).*

b. Proper Civil and Racial Status.—No provision. *There was formerly a statute penalizing the intermarriage of a pure white person with a person visibly of African blood (24, 44).*

c. Proper Legal Status.—Persons not having a spouse living may be joined in marriage (11181), and divorce may be granted if either party had a spouse living at the time of marriage (11979). *The marriage of a person already married is void (4, 45, 46, 47, 48, 49, 50) absolutely (49), is no marriage at all (48), and will not sustain an indictment for bigamy (45). The statute allowing divorce where either party has a spouse living is meant only to authorize adjudication and alimony (45).* A person shall be imprisoned from one to seven years if such person marries another during the life of a spouse who has not been continually absent for the preceding five years without being known to such person to be living within that time (13022). *A person*

already married who marries another commits bigamy (28) if not within an exception to the statute (51, dictum). Where the first spouse has been absent as provided and not known to be living before the later marriage, to come within the statutory exception the defendant need not show due diligence in attempting to ascertain the first spouse's whereabouts (52). But the presumption of death after absence is not applicable where failure of the absentee to communicate with his friends during the established period can be satisfactorily accounted for on a hypothesis other than death (53).

The rendition of a decree of divorce fixes the status of the parties eo instanto *(54), and the divorce action may not be reopened even a few days thereafter if one of the parties, without knowledge of the reopening, married another person in the meantime (55).*

d. Proper Consent of Parties.—*Mere words without intention corresponding to them will not create a marriage contract (56).* Divorce may be granted for fraudulent contract (11979). *The fraud necessary to vitiate a marriage agreement must go to the essentials of the contract and not merely to preliminary inducements (6, 57, 58). Thus misrepresentations of character or social standing (57), health—concealment of the fact of a glass eye (59)—or antenuptial incontinence, no pregnancy having resulted, do not constitute fraud allowing of dissolution of marriage (58). Nor would a fraudulent representation that one could rightfully make a false affidavit to procure a marriage license (6). But concealment of pregnancy at the time of marriage, unknown to the husband who probably had no antenuptial relations with the woman, does allow of divorce for fraud (60), as might also concealment of intermittent insanity (11). And an unconsummated marriage, gone through by the man intending not to consummate it or recognize its obligations but only to procure his release from custody for bastardy, is voidable for fraud on suit by the injured woman (56).* [Note: Taking a female unlawfully with intent to compel her marriage is punishable by imprisonment of from two to twelve years and by fine not exceeding $5000 (13031-1).]

5. STATE SUPERVISION

No provision.

6. INTERSTATE RELATIONS

No statutory provision. *The law of the place of contract governs the validity or invalidity of a marriage (61); a marriage valid where contracted is valid everywhere unless bigamous, incestuous, or contrary to*

public policy (1). In absence of a statute declaring void a marriage in evasion of the law of this state, a marriage valid where contracted and valid according to the common law is valid here (1). But a marriage contrary to the criminal law as to incest, even if valid where contracted, need not be recognized here as a bar to prosecution (40).

7. SEX OFFENSES AND MARRIAGE

No statutory provision. *The marriage of a woman with the man whom she charges with causing her pregnancy would seem to effect his release (56), but a marriage after birth of the child does not itself dismiss the bastardy prosecution because of the public interest in the support of the child (62).*

OHIO CASES

1. Courtright v. Courtright, 11 Dec. Rep. 413 (1891); 26 Bull. 309; affirmed, 53 St. 685 (1895). **2.** Shafher v. State, 20 O.1 (1851). **3.** Holtz v. Dick, 42 St. 23 (1884). **4.** Heath v. Heath, 25 N.P. (N.S.) 123 (1924). **5.** Vernon v. Vernon, 9 Dec. Rep. 365 (1883); 12 Bull. 237. **6.** Ott v. Ott, 3 N.P. 161 (1893); 3 O. Dec. (N.P.) 684. **7.** Klinebell v. Hilton, 25 N.P. (N.S.) 167 (1924). **8.** Rush v. Wick, 31 St. 521 (1877). **9.** Moser v. Long, 8 App. 10 (1916); 27 C.A. 145; 28 C.D. 288. **10.** Waymire v. Jetmore, 22 St. 271 (1872). **11.** Benton v. Benton, 16 C.C. (N.S.) 121 (1909); 26 C.D. 613. **12.** McCleary v. Barcalow et al., 6 C.C. 481 (1891); 3 C.D. 547. **13.** Goodheart v. Ransley, 11 Dec. Rep. 655 (1892); 28 Bull. 227. **14.** Goodhart v. Speer, 18 C.C. 679 (1893); 7 C.D. 47. **15.** Clowry v. Clowry, 16 C.C. 302 (1896); 8 C.D. 652. **16.** Larwill v. Kirby, 14 O. 1 (1846). **17.** Call v. State, 20 St. 330 (1870). **18.** Field v. State, 9 C.C. (N.S.) 245 (1907); 19 C.D. 302. **19.** Warwick v. State, 25 St. 21 (1874). **20.** Staight v. State, 39 St. 496 (1883).

21. In re Reinhart, 6 N.P. 438 (1899); 9 O. Dec. (N.P.) 441. **22.** Carmichael v. State, 12 St. 553 (1861). **23.** Swartz v. State, 13 C.C. 62 (1896); 7 C.D. 43. **24.** Fergus v. Nash, 48 Bull. 442 (1903). **25.** Dirion v. Brewer, 20 App. 298 (1925). **26.** Bates v. State, 9 C.C. (N.S.) 273 (1906); 19 C.D. 189; affirmed as to evidence, 77 St. 622 (1908). **27.** Mieritz v. Insurance Co., 8 N.P. 422 (1901); 11 O. Dec. (N.P.) 759. **28.** State v. Bates, 4 N.P. (N.S.) 502 (1906); 17 O. Dec. (N.P.) 301; reversed as to evidence, 77 St. 622 (1908). **29.** Drach v. Drach, 9 N.P. (N.S.) 353 (1910). **30.** Umbenhower v. Labus, 85 St. 238 (1912). **31.** Walker v. Walker, 15 N.P. (N.S.) 189 (1913). **32.** Howard v. Central National Bank, 21 App. 74

(1926). **33.** In re Barrett, 49 Bull. 222 (1904). **34.** Umbenhour v. Umbenhour, 12 C.C. (N.S.) 289 (1909); 21 C.D. 317. **35.** Duncan v. Duncan, 10 St. 181 (1859). **36.** Johnson v. Dudley, 3 N.P. 196 (1896); 4 O. Dec. (N.P.) 243. **37.** Lipen v. Lipen, 7 Dec. Rep. 141 (1876); 1 Bull. 164. **38.** Stanglein v. State, 17 St. 453 (1867). **39.** Hanley, alias Whalon, v. State, 12 C.C. 584 (1896); 5 C.D. 488. **40.** State v. Brown, 47 St. 102 (1890).

41. Stewart v. State, 39 St. 152 (1883). **42.** Chinn v. State, 47 St. 575 (1890). **43.** Noble v. State, 22 St. 541 (1872). **44.** State v. Bailey, 11 Bull. 151 (1884). **45.** State v. Moore, 1 Dec. Rep. 171 (1845); 3 W.L.J. 134. **46.** Smith v. Smith, 5 St. 32 (1855). **47.** Evans v. Reynolds, 32 St. 163 (1877). **48.** Briscoe v. Reed, 9 Dec. Rep. 360 (1883); 12 Bull. 234. **49.** Fultz v. Fultz, 9 N.P. (N.S.) 593 (1910); 21 O. Dec. (N.P.) 159. **50.** Lynch v. State, 5 App. 16 (1915). **51.** Supreme Commandery v. Everding, 20 C.C. 689 (1893); 11 C.D. 419. **52.** Harms v. State, 16 C.C. (N.S.) 443 (1906); 31 C.D. 615. **53.** McHenry v. McHenry, 19 App. 187 (1923). **54.** Sapp v. Sapp, 14 C.C. (N.S.) 269 (1909). **55.** Nauman v. Nauman, 4 C.C. (N.S.) 298 (1897); 16 C.D. 37. **56.** Miller v. Miller, 1 O. Dec. (N.P.) 354 (1894); 31 Bull. 141. **57.** Meyer v. Meyer, 7 Dec. Rep. 561 (1878); 3 Bull. 985; 7 Dec. Rep. 627 (1879); 4 Bull. 368. **58.** Joy v. Joy, 12 O. Dec. (N.P.) 574 (1900). **59.** Kraus v. Kraus, 6 N.P. 248 (1899); 9 O. Dec. (N.P.) 515. **60.** Morris v. Morris, Wright 630 (1834); 10 Bull. 205. **61.** Charrier v. State, 29 C.A. 97 (1918); 30 C.D. 578. **62.** Law v. Cline (Albert), 16 C.C. 159 (1898); 8 C.D. 784; 9 C.D. 106; affirmed, 62 St. 649 (1900).

OKLAHOMA

REFERENCES: Compiled Statutes of Oklahoma (two volumes), 1921; Supplement, 1926; Session Laws of Oklahoma, 1927; Reports through Volume 122 Oklahoma and 22 Oklahoma Criminal.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Compiled Statutes, unless the Supplement thereto is specifically cited, and to session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Oklahoma section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—No person shall enter into or contract the marriage relation without a license being first issued authorizing the marriage between the persons named (7491). *The statutory requirement is directory only (1).*

b. Issuer.—License is issued by the judge or clerk of the county court of any county (7491), but such license shall be valid only in the county where issued (7492). *A marriage was valid in the Cherokee Nation if under a license issued not by the district clerk or his deputy, as required, but by an unofficial person transacting the business of the office (2).*

c. Compensation of Issuer.—For issuing and recording marriage license and entering return the county judge shall collect $3.00 (6344) which the clerk of the county court shall pay into the county treasury (6358), the judge in various counties receiving as full compensation a salary (6354; 6461; 6462; Sup. 6475-1; S.L. 1927, chs. 122, 133, 158, 164), payable monthly out of the county treasury (6456). *All fees in excess of the salaries provided for county judges must be paid over to the county (3, 4).*

d. Personal Appearance by Candidates.—Application for license is made in writing signed and sworn to in person before the issuer by a person legally competent to make oath and having personal knowledge of the facts (7492).

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—[No provision as condition to license issuance other than 7492 under 1k.] Every male under eighteen and female under fifteen years is expressly forbidden to marry, except that courts may authorize the marriage of persons under such ages, if not incestuous, in settlement of suits for seduction and bastardy (7490). The marriage of a person incapable of contracting from want of age may be declared void in an action brought by the incapable party or his parent or guardian unless there be cohabitation after such incapacity ceases (513). *Want of age renders a marriage voidable only, not void (5, 6). It has been held that the evasive marriage of a person under the age of consent domiciled in this state, though validly contracted elsewhere, can be annulled here (7).*

g. Parental Consent.—Any unmarried male of twenty-one or female of eighteen years, otherwise qualified, is capable of contracting marriage, but no person under such ages shall enter into marriage, nor shall a license issue therefor, except upon the express consent by the parent or guardian given in person or in writing acknowledged before some officer authorized to take acknowledgments to deeds (7490). [Note: Abduction of a girl under fifteen years for purpose of marriage without consent of her parent or guardian is punishable by imprisonment in the penitentiary not exceeding five years or in the county jail not exceeding one year, by fine not exceeding $1000, or both (1842).] *Penalty.* See 7502 under 1k.

h. Mental and Physical Qualifications.—[No provision as condition to license issuance.] The marriage of a person incapable of contracting from want of understanding may be declared void in an action brought by the incapable party unless there be cohabitation after such incapacity ceases (513). *Inasmuch as the issuer must ascertain that no legal impediment exists* [see 7492 under 1k], *when he knows the situation as to mental competency and yet issues a license that is evidence as to the competency (8). Penalty.* Any person marrying another after becoming infected with venereal disease and before being pronounced cured by a reputable physician in writing shall be punished by imprisonment of from one to five years (9008). Divorce may be granted when the wife at the time of marriage was pregnant by one other than her husband (501).

i. Form of License.—The license, under the hand of the issuer and seal of his court, shall contain the date of issuance, name and location of court, and the names, ages, and residence of the parties, shall

be directed to any person authorized to perform the marriage ceremony, and shall contain a blank certificate to be made out by the officiant (7492; 7493).

j. Record of License.—The record of the license shall be made before it is delivered to the applicant (7496). [See 3b.] *Penalties.* Any issuer knowingly concealing any record of a marriage license contrary to the provisions of this chapter shall be punished by fine of from $100 to $500, imprisonment for from thirty days to one year, or both (7502). [See also 2033 and 2035 under 3b.]

k. Other Provisions.—The issuer upon application setting forth the names, ages, and residence of the parties, and that they are not incapable of entering into marriage nor within the prohibited degrees of relationship [see 4a], and being satisfied of the truth and sufficiency of such application and the absence of any legal impediment, shall issue the license authorizing such marriage (7492). The issuer being in doubt of the legal capacity of the parties to contract marriage shall require evidence additional to that contained in the application, may examine witnesses or require affidavits, and unless satisfied of the legality shall not issue a license (7497). [As to life of license, see 7493 under 3a.] *Penalty.* Any issuer knowingly issuing a license contrary to the provisions of this chapter shall be punished by fine of from $100 to $500, imprisonment for from thirty days to one year, or both (7502).

2. SOLEMNIZATION

a. Officiant.—Marriages may be performed by a justice of the supreme court, by a judge of the district, superior, or county court, by a justice of the peace—within the county in which he holds office (7495)—or by a minister of the gospel or priest or other ecclesiastical dignitary of any denomination who has been duly ordained or authorized by the church to which he belongs (7494).

b. Officiant's Credentials.—Marriages may be performed by a minister or priest who has filed for record in the office of the judge of the county of his residence a copy of his credentials from his church authorizing him to solemnize marriage; no fee shall be charged for such recording (7494).

c. Presentation of License.—No person shall solemnize marriage without a license authorizing the marriage of the persons therein named (7491) being first delivered into his possession, or without

good reason to believe the persons presenting themselves to be the identical persons named in the license (7494). *Penalty.* See 7502 under 2g.

d. Form of Ceremony.—All marriages must be contracted by a formal ceremony performed in the presence of at least two adult competent witnesses (7494). *Marriages among members of Indian tribes according to tribal customs, and recognized as such, are valid in this state (9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21) even though not strictly in conformity with tribal law (22, 23). Since the admission of Oklahoma to statehood on 16 November, 1907, Indians have become citizens of the state and subject to its general laws on marriage and divorce (24).*

e. Common Law Marriage.—The marriage relation shall only be entered into as provided by law (7488). *Even as common law marriages were valid in Nebraska when Oklahoma Territory was governed by the law of that state (25) and were valid in Indian Territory (26, 27, 28), so too are common law marriages valid under the law of Oklahoma (1, 24, 29, 30, 31, 32, 33). In the absence of any statutory interdiction marriage may be contracted by an actual, mutual agreement between capable parties to enter into the marriage relation, consummated by cohabitation or open assumption of marital rights and duties (1, 25, 26, 30, 34, 35). The marriage of Indians, though not according to tribal custom (36), will be valid if valid according to the common law (13, 36, 37). And similarly the marriage, according to the common law, of a person under the statutory age of consent if over the common law age of consent (6). [Quaere.—G.M.] Though cohabitation and reputation as husband and wife do not themselves constitute marriage (38, 39), they are facts from which a marriage may be presumed (31, 37, 38, 39, 40, 41, 42) if the cohabitation was matrimonial (18, 19, 38) and not spasmodic only (43) and the parties acted in good faith (44, 45, 46) and with intention of marriage (41, 45). The presumption of marriage would be rebutted if the man cohabited with more than one woman at the same time (39) and weakened if the woman was a prostitute (27).*

When parties in good faith comply with the forms of law which would give rise to their marriage but for one being under a disability, the law infers that matrimonial consent was interchanged between them as soon as the disability was removed and stamps their relation with the status of a valid marriage (47, 48). But where both parties know one to be under a disability and the relations, criminal in their inception, continue without apparent change after removal of the impediment, the relations do not ripen ipso facto into a common law marriage (44).

Where, however, the subsequent relations show a common law marriage to have been entered into after removal of the impediment, original good faith is immaterial (49).

f. Irregular Solemnization.—No provision.

g. Other Provisions.—No authorized officiant shall perform the marriage ceremony unless he has good reason to believe that there is no legal impediment to such marriage (7494). *Penalties.* Any authorized officiant knowingly solemnizing matrimony between persons prohibited by this chapter from intermarrying shall be fined not exceeding $500 and imprisoned from one to five years (7501). Any authorized officiant knowingly solemnizing marriage contrary to the provisions of this chapter shall be punished by fine of from $100 to $500, imprisonment for from thirty days to one year, or both (7502).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant immediately after the ceremony shall endorse upon the license a certificate signed by him giving his name, official designation, the body of which he is a dignitary, and where the same is located, and the name and address of the witnesses; and without delay shall transmit the license with such certificate to the issuer (7495). The license shall fix the time of the return thereof, which shall not be more than thirty days from the date of issuance (7493). *Penalty.* See 7502 under 2g. [Quaere as to applicability of such penalty to provisions as to returns.—G.M.]

b. Local Record.—The issuer shall make a complete record of the application, license, and certificate in connected form in a properly indexed book, open to public inspection, and shall make the record of the certificate upon return of the license (7496). *Penalty.* Any county officer wilfully failing to perform the duties of his office according to law is guilty of a misdemeanor (2033, 2035), punishable by imprisonment not exceeding one year, fine not exceeding $500, or both (1508).

c. State Record.—No provision.

d. Evidence.—Copies of any record kept by the judge of the county court, certified by the judge, shall be received as evidence in all courts (7498). *The marriage record of a clerk of court is admissible without proof of the signature of the officiant (50). A marriage among*

Indians may be proved by enrollment before the Commission to the Five Civilized Tribes (*17*). A church record of marriages, or copy certified and verified by the pastor or keeper of such record, required to be kept by custom of any religious society in this state, shall be admitted as evidence (646; 647).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Marriages within the prohibited degrees are incestuous, illegal, and void, and are expressly prohibited (7489). [As to prohibition of license issuance, see 7492 under 1k.] *The marriage of first cousins is absolutely void from the beginning and subject to collateral attack* (*51, 52*). *Penalty.* Persons marrying within degrees of consanguinity within which marriages are declared to be incestuous and void are punishable by imprisonment not exceeding ten years (1866). [As to penalty for solemnizing such marriages, see 7501 under 2g.] [The only penalty for the marriage of a step-parent and stepchild, not being consanguineous, would seem to be: where the performance of an act is prohibited by any statute, the doing of such act is a misdemeanor (2286), punishable by imprisonment not exceeding one year, fine not exceeding $500, or both (1508).—G.M.]

b. Proper Civil and Racial Status.—The marriage of persons of African descent with persons not of African descent shall be unlawful and is hereby prohibited (7499). *Though the statute does not declare the nullity of interracial marriages, in accord with public policy such marriages are to be held absolutely void* (*53*). *Even the marriage, validly contracted in another state, between a Negro and an Indian, citizens of Oklahoma, is void* (*54*). *Penalty.* Any person marrying in violation of the preceding section shall be fined not exceeding $500 and imprisoned from one to five years (7500). [As to penalty for solemnizing such marriages, see 7501 under 2g.]

c. Proper Legal Status.—Polygamous or plural marriages are forever prohibited (Const. Art. I, §2; Enabling Act, §3). Divorce may be granted when either party has a former spouse living at the time of the subsequent marriage (501). Any person having been married to another who remains living who marries any other person shall be imprisoned not exceeding five years (1862; 1864), unless the former spouse has been absent for five successive years without being known to such person within that time to be living or has absented himself and remained without the United States for five successive years,

or has been sentenced to imprisonment for life, or unless the former marriage has been pronounced void, annulled, or dissolved (1863). *A marriage contracted after a common law marriage and before its dissolution is bigamous* (*29*).

A divorce decree does not become absolute until the expiration of six months from the date of its being granted or as provided in case of appeal (512). It shall be unlawful for either party to a divorce to marry any other person in this state within six months after the decree, and to marry in any other state within six months and cohabit with such second spouse in this state during that period (Sup. 510). *Penalty.* Any person violating this section shall be deemed guilty of bigamy (Sup. 510). [See 1862–1864 hereinbefore.] *A divorce is final when granted and dissolves the marriage* (*55*); *the six months' period applies only to prevent remarriage* (*55, 56*). *The parties to a divorce, though prohibited from marrying a third person within six months, are not prohibited from remarrying each other* (*41, 57*), *and an indictment for bigamy for remarrying within such period must allege the bigamous wife to be a person other than the divorced wife* (*58*). *Remarriage within the six months is impossible* (*46*), *the parties having no capacity to contract a marriage with another person within that time* (*59*), *and any attempted marriage is void* (*48, 49, 59*).

There is a presumption in favor of the validity of a later marriage duly solemnized according to law (*11, 12, 60, 61, 62, 63, 64, 65*), *shifting to the opponent thereof the burden of proving continued subsistence of an earlier marriage* (*11, 41, 60, 62, 66*).

d. Proper Consent of Parties.—Marriage is a personal relation arising out of a civil contract to which the consent of parties capable of contracting is necessary (7488). Divorce may be granted for fraudulent contract (501). *Penalty.* Any person taking a woman against her will and compelling her to marry him or any other person is punishable by imprisonment for not less than ten years (1840). [Note: Taking a woman with intent to compel her marriage is punishable by imprisonment not exceeding ten years (1841).]

5. STATE SUPERVISION

No provision.

6. INTERSTATE RELATIONS

No general statutory provision. [As to marriage in another state within six months after decree of divorce in Oklahoma, see 510

under 4c.] *When Indian nations were recognized as controlling their own domestic affairs, marriages contracted in their jurisdiction according to their custom were valid in this state (9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 67). Every sovereign state has power to declare what marriages between its citizens, contrary to public policy, shall have no validity in its courts though contracted in jurisdictions under whose laws they would ordinarily be valid (7, 54, 59.) There is some question as to whether the statutory prohibition of remarriage within six months after divorce was meant to have extra-territorial effect upon marriages validly contracted elsewhere (46, 59).*

7. SEX OFFENSES AND MARRIAGE

The subsequent marriage of the parties is a defense to a prosecution for seduction (1844). The act or state of marriage shall not be a defense to a prosecution for pandering (1849).

OKLAHOMA CASES

1. In re Love's Estate, 42 O. 478 (1914). **2.** Nofire v. U S., 164 U.S. 657 (1897). **3.** State ex rel. Brady v. Frear, 21 O. 397 (1908). **4.** Finley v. Territory, 12 O. 621 (1903). **5.** Hunt v. Hunt, 23 O. 490 (1909). **6.** Hughes v. Kano, 68 O. 203 (1918). **7.** Ross v. Bryant, 90 O. 300 (1923). **8.** Nichols v. Clement Mortgage Co., 112 O. 155 (1925). **9.** Oklahoma Land Co. v. Thomas, 34 O. 681 (1912). **10.** Buck v. Branson, 34 O. 807 (1912). **11.** Chancey v. Whinnery, 47 O. 272 (1915). **12.** James v. Adams, 56 O. 450 (1915). **13.** Crickett v. Hardin, 60 O. 57 (1916). **14.** Johnson v. Dunlap, 68 O. 216 (1918). **15.** Meagher v. Harjo, 72 O. 206 (1919). **16.** Sealey v. Smith, 81 O. 97 (1921). **17.** In re Estate of McDade, 95 O. 120 (1923). **18.** Davis v. Reeder, 102 O. 106 (1924). **19.** Proctor v. Foster, 107 O. 95 (1924). **20.** Aldrich v. Hinds, 110 O. 53 (1925).

21. McFarland v. Harned, 115 O. 291 (1926). **22.** Butler v. Wilson, 54 O. 229 (1915). **23.** Carney v. Chapman, 247 U.S. 102 (1918). **24.** Palmer v. Cully, 52 O. 454 (1915). **25.** Reaves v. Reaves, 15 O. 240 (1905). **26.** Porter v. U.S., 7 Indian Terr. 616 (1907). **27.** Warren v. Canard, 30 O. 514 (1911). **28.** Clarkson v. Washington, 38 O. 4 (1913). **29.** Draughn v. State, 12 Crim. 479 (1916). **30.** In re Sander's Estate, 67 O. 3 (1917). **31.** Coleman v. James, 67 O. 112 (1917). **32.** Baker v. Jack, 112 O. 142 (1925). **33.** Fisher v. Fisher, 116 O. 129 (1925–26). **34.** Bothwell v. Way, 44 O. 555 (1914). **35.** Davis v. Pryor, 112 Fed. 274 (1901); reversing 3 Indian Terr. 396 (1900). **36.** Smith v. Lindsey, 91 O. 8 (1923). **37.**

Sandlin v. Tiger, 104 O. 107 (1924). **38.** Fender v. Segro, 41 O. 318 (1913). **39.** Horrigan v. Gibson, 87 O. 1 (1922). **40.** Linsey v. Jefferson, 68 O. 156 (1918).

41. Thomas v. James, 69 O. 285 (1918). **42.** Smith v. Blunt, 84 O. 225 (1921). **43.** Thompson v. Smith, 102 O. 150 (1923). **44.** Clark v. Barney, 24 O. 455 (1909). **45.** Page v. Roddie, 92 O. 236 (1923). **46.** Yeats v. State, 236 Pac. 62 (1925). **47.** Webster v. Webster, 114 O. 57 (1925–26). **48.** Mudd v. Perry, 108 O. 168 (1925). **49.** Stuart v. Schoonover, 104 O. 28 (1924). **50.** Duncan v. State, 214 Pac. 937 (1923). **51.** Fearnow v. Jones, 34 O. 694 (1912). **52.** Krauter v. Krauter, 79 O. 30 (1920). **53.** Blake v. Sessions, 94 O. 59 (1923). **54.** Eggers v. Olson, 104 O. 297 (1924). **55.** In re Smith, 2 O. 153 (1894). **56.** Barnett v. Frederick, 33 O. 49 (1912). **57.** Dunlap v. Dunlap, 88 O. 200 (1923). **58.** Niece v. Territory, 9 O. 535 (1900). **59.** Atkeson v. Sovereign Camp, 90 O. 154 (1923). **60.** Haile v. Hale, 40 O. 101 (1913).

61. Coachman v. Sims, 36 O. 536 (1913). **62.** Copeland v. Copeland, 73 O. 252 (1918). **63.** Istincheyou v. Clark, 84 O. 125 (1921). **64.** Cox v. Cox, 95 O. 14 (1923). **65.** Madison v. Steckleberg, 101 O. 237 (1924). **66.** Brokeshoulder v. Brokeshoulder, 84 O. 249 (1921). **67.** Coker v. Moore, 121 O. 219 (1926).

OREGON

REFERENCES: Oregon Laws (Olson) (two volumes), 1920; General Laws of Oregon, 1921, 1921 (special session), 1923, 1925, 1927; Reports through Volume 119.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Oregon Laws and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Oregon section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Before any persons can be joined in marriage a license shall be procured therefor (9731, as amended G.L. 1925, ch. 82). [As to certain marriages without license, see 2e.]

b. Issuer.—License is procured from a county clerk (9731, as amended G.L. 1925, ch. 82).

c. Compensation of Issuer.—For making, issuing, and registering a marriage license the county clerk shall collect a fee of $3.00, and no more, which he shall pay over to the treasurer of his county (9733), the county clerk receiving a monthly salary as exclusive compensation for his services (3631). [Note: Elsewhere the statutes provide that the fee for issuance shall be $2.00 (3635). Special provisions applying only to Multnomah County provide a fee of $3.00 (G.L. 1925, ch. 243, §2) and payment over to the county treasurer (3636).]

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—Marriage may be entered into by males of eighteen and females of fifteen years (9720). License shall not issue unless each party is of an age capable of contracting marriage (9732). [As to affidavit of proof of age, see 9733 under 1g.] *Penalty.* See 9735 under 1k. The marriage of a party incapable of consenting thereto for want of legal age is voidable, but only on suit of the party

under the disability (9722; 503) and in absence of free cohabitation after arrival at legal age (505). *A girl of seventeen years may marry with parental consent and thereupon loses her status as a child* (*1*).

g. Parental Consent.—If the female be within eighteen or the male within twenty-one years license shall not issue without the written consent of the parent or guardian, if there be any, or if not, unless the female has resided for the preceding six months within the county where application for license is made (9732). Before license issues the applicant shall file with the county clerk an affidavit of some person other than the parties, showing the facts specified in the last section (9733). *Penalty.* See 9735 under 1k. [Note: Any person taking a female under sixteen years from her parent or guardian without his consent for the purpose of marriage shall be imprisoned in the penitentiary for from one to two years or in the county jail for from three months to one year, or fined from $100 to $500 (2085).] *The marriage of a ward without consent of the guardian, though a violation of statute which may lead to penalties, is not void under our law but only voidable* (*2*).

h. Mental and Physical Qualifications.—The marriage of a party incapable of consenting thereto for want of sufficient understanding is voidable, but only on suit of the party under the disability (9722; 503) and in absence of free cohabitation after acquisition of sufficient understanding (505). *It has been stated by way of dictum that either party may sue to dissolve a marriage contracted in another state and voidable for want of understanding* (*3*) [*presumably his own want of understanding—G.M.*]. *To warrant annulment for mental incapacity there must be inability to comprehend the nature of the business and to understand its quality and consequences* (*4*). [An act providing for mental and physical examination of both applicants and prohibiting license issuance to subnormal persons except after sterilization failed to pass the referendum therein provided for (G.L. 1921, ch. 184).—G.M.]

Before license issuance by the county clerk the applicant shall file with the issuer a certificate of a physician authorized to practice in this state, made under oath within the ten preceding days, showing that the male party is free from contagious or infectious venereal disease (9737). [Note: The physician's fee for examination shall not exceed $2.50 (9739), and county physicians will examine indigent applicants without charge (9740).] *Penalties.* Any physician knowingly making any false statement in a certificate shall be punished by revocation of license to practice in this state (9738). Any officer

wilfully neglecting to perform any duty pertaining to his office, to the hindrance of public business or injury of anyone whether intended or not, shall be punished by imprisonment in the penitentiary for from six months to one year or in jail for from three months to one year, by fine of from $50 to $500, or by dismissal from office (2043). [*As to concealment of antenuptial pregnancy or incontinence constituting fraud allowing of annulment, see* 4d.]

i. Form of License.—The license authorizes any proper officiant to join the parties in marriage (9731, as amended G.L. 1925, ch. 82).

j. Record of License.—Before delivering the license the issuer shall enter in the marriage book a memorandum of the names of the parties and of the affiant, the substance of the affidavit, parental consent if any, and date of license (9734). *Penalty.* See 9735 under 1k.

k. Other Provisions.—The issuer shall procure the addresses of both parties and of the affiant (9731, as amended G.L. 1925, ch. 82). *Penalties.* Any clerk issuing a license contrary to the provisions of this act on marriage shall be punished by imprisonment of not more than one year or by fine of from $100 to $500 (9735; 2161). Any issuer knowingly licensing a miscegenetic marriage [see 2163 under 4b] shall be imprisoned for from three months to one year and fined from $100 to $1000 (2165).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by any judicial officer of the state within his jurisdiction, by any minister or priest authorized by any church carrying on its work and having congregations in the state (9723), and by any religious organization according to its form (9730). *An Indian agent, a devout Methodist and known as "preacher," assuming to solemnize marriage as a minister, is presumed to be a minister though no record is shown of his formal authorization* (5).

b. Officiant's Credentials.—Marriages may be solemnized by an authorized minister or priest after he has filed for record with the clerk of the county where he resides or where the marriage is solemnized—in one county only—satisfactory evidence that he has been licensed or authorized by his church, which evidence the clerk shall record upon approval; and a minister solemnizing a marriage in any other county shall endorse upon the certificate of marriage a statement showing his place of residence and the county where his evidence of authority is recorded (9723). *Penalties.* As to solemnizing

marriage without authority, see 9736 and 2162 under 2f. As to failure to endorse record of registration upon marriage certificate, see 9728 under 3a.

c. Presentation of License.—The license is directed to any proper officiant, authorizes the marriage of the persons named (9731, as amended G.L. 1925, ch. 82), and is retained by the officiant (9734). *Penalty.* See 9736 under 2g.

d. Form of Ceremony.—No particular form is required for the solemnization of a marriage except that the parties thereto shall assent in the presence of the officiant and of at least two attending witnesses to take each other as husband and wife (9724). All marriages solemnized before any religious organization according to its established form are valid (9730). *A marriage between Indians according to tribal customs, followed by cohabitation as husband and wife, is a lawful union (6, 7, 8, 9 dictum).*

e. Common Law Marriage.—*The statutory requirements for marriage are mandatory, and common law marriages are not to be recognized as valid in this state (10, 11). These requirements at one time were considered directory only (12).* The cohabitation in this state as husband and wife for one year by persons not otherwise married prior to 27 February, 1925, is hereby declared to constitute a valid marriage if there are children living as a result of such relation, and the children born after the beginning of such cohabitation are legitimate offspring of such marriage (G.L. 1925, ch. 269). *Cohabitation as man and wife, though raising a presumption of marriage (5), cannot create a marriage no matter how long indulged in (11). Nor can cohabitation continued after removal of an impediment to a ceremonial marriage create a common law marriage (10).*

f. Irregular Solemnization.—The validity of a marriage solemnized before any person professing to be and acting as an authorized officiant is not affected on account of want of authority in such person, if consummated with the belief of the parties, or either of them, that they were lawfully married (9729). *Penalty.* Any person joining others in marriage, knowing himself not legally authorized, shall be punished by imprisonment not exceeding one year or by fine of from $100 to $500 (9736; 2162).

g. Other Provisions.—*Penalties.* Any person joining others in marriage contrary to the provisions of this act on marriage shall be punished by imprisonment not exceeding one year or by fine of from

$100 to $500 (9736; 2162). Any authorized officiant solemnizing or intending to solemnize a miscegenetic marriage within this state [see 2163 under 4b] shall be imprisoned for from three months to one year and fined from $100 to $1000 (2165). [*Note: Inasmuch as the statute authorizes collection of fees by justices of the peace in counties of over 50,000 population only in cases of litigation, the justice should collect no fee for solemnizing marriage (13).*]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant (or witnessing clerk[1]) shall give to each party, if required, a certificate of marriage specifying the names and residence of the parties and of at least two witnesses, the time and place of marriage, and the date and issuer of the license (9725), and within one month after the marriage shall deliver to the clerk of the county where license issued and also where the ceremony took place a certificate of such facts (9726; 9730). [See 9731 under 3b.] *Penalty.* An officiant failing to deliver to the county clerks within the specified time the required certificates and the statement endorsed thereon as required by §9723 [see 2b] shall forfeit a penalty of from $10 to $50 for every five days of such failure (9728).

b. Local Record.—The county clerk shall file and record the certificate in the record of marriages without fee (9727), and if the certificate is not returned within the time specified he shall notify the parties interested (9731, as amended G.L. 1925, ch. 82). *Penalty.* See 9735 under 1k or 2043 under 1h.

c. State Record.—The county clerk shall report monthly to the secretary of the State Board of Health the number of marriages and the number of marriage licenses issued within his county and such facts relating to them as may be provided for by blanks furnished to such clerk by the secretary of such board (8489; G.L. 1925, ch. 229), which reports as to licenses shall be filed, compiled, and registered by such secretary and shall be public records (G.L. 1925, ch. 229). *Penalty.* See 2043 under 1h.

d. Evidence.—Entries in official records made by a public officer in performance of his duty in this state are primary evidence of the facts stated (768). So too are official documents of sister states or foreign countries if properly certified (766). *A copy of the record of a*

[1] Introduction, see p. 24.

marriage license and certificate in another state, certified under seal by the custodian and authenticated by the judge, is competent proof (14). The officiant's certificate of marriage, being part of the res gestae, *is admissible in connexion with proof of the parties' identity as evidence of a legal marriage (15).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (9721). Such marriages if solemnized within this state shall be absolutely void (502). *But a marriage of first cousins, solemnized outside the state between citizens of the state, is not declared void by the statute (16). Penalty.* Persons intermarrying within the prohibited degrees shall be punished by imprisonment in the penitentiary of from one to three years or in the county jail of from three months to one year, or by fine of from $200 to $1000 (2098).

b. Proper Civil and Racial Status.—The marriage of a white person with a person of one-fourth or more Negro or Mongolian blood is prohibited (9721). It shall be unlawful for any white person hereafter to intermarry with any person having one-fourth or more Negro, Chinese, or Kanaka blood, or any person having more than one-half Indian blood, and all such marriages shall be absolutely null and void (2163; 502). *Statutes prohibiting miscegenation, being applicable to races equally, are constitutional (17). Penalty.* Any persons marrying within the degrees forbidden by §2163 or procuring the solemnization of such marriage shall be punished by imprisonment of from three months to one year (2164). [As to penalty for license issuance and solemnization, see 2165 under 1k and 2g.]

c. Proper Legal Status.—The marriage of a person having a spouse living is prohibited (9721) and is absolutely void (502), and any person so marrying shall be punished by imprisonment in the penitentiary of from one to four years or in the county jail of from six months to one year, or by fine of from $300 to $1000 (2073), unless the former spouse shall have been legally divorced or shall have voluntarily withdrawn and remained absent for seven consecutive years from the party marrying again, who does not know the spouse to be living within that time (2074). *To support an action for a declaration of nullity because of a prior marriage there must be proof of the legality of such prior marriage and of its subsistence at the time of the later marriage (18, 19, 20). Bigamy is still a crime notwithstanding the penalty for lewd and lascivious cohabitation (14).*

A decree of nullity or dissolution terminates the marriage as to both parties except that neither shall be capable of contracting marriage with a third person until determination upon appeal or until the expiration of six months from the date of decree, whichever period is the longer, and any party so remarrying shall be liable as if no decree had been given (515). *A marriage within the forbidden period after divorce is void whether contracted in this state or elsewhere by domiciliaries of this state in evasion of the interdiction (21, 22). Where there can be no appeal from the divorce decree the final order terminates the marriage relation immediately (23), and if one party alone can appeal he may possibly waive that right to the extent of remarrying a day before the six months' period has expired (24).* [Note: Marriages solemnized prior to 1919 within the six months' period are valid notwithstanding (9742). *This statute validates also the marriage in another state of residents of Oregon contracted within six months after a divorce in Oregon (25).*] *A ceremony of marriage in good faith and a belief in its legality raises a presumption of the validity of such marriage (26), a presumption which can be overcome only by such proof as that of the legality and continued subsistence of a prior marriage (18, 19, 20).*

d. Proper Consent of Parties.—Marriage is a civil contract (9720), voidable on suit of the injured party when the consent of either party shall be obtained by force or fraud (9722; 503) unless ratified by cohabitation after removal of the force or discovery of the fraud (505). *Though concealment from the husband of antenuptial pregnancy by another man may constitute fraud warranting annulment (27), not so the mere concealment by the woman of the previous birth of an illegitimate child (28) or the concealment of pregnancy where the husband himself had improper relations with her before marriage or actually knew the facts despite the concealment (27). To allow of annulment the evidence must establish that duress compelled the marriage (29).*

5. STATE SUPERVISION

The secretary of the State Board of Health shall furnish to county clerks blanks on which to report the number of marriages and licenses issued and facts relating thereto (8489; G.L. 1925, ch. 229). [See 3c.]

6. INTERSTATE RELATIONS

No statutory provision. *A marriage valid where contracted is valid everywhere (2, 16, 17, 21), even in the state of the parties' domicil to evade whose laws the parties left the state to contract a marriage else-*

where (2), unless polygamous (21, 22), incestuous, or contrary to the express public policy of the local law-making body (2). A marriage of first cousins is not within the exception as to incest (16). A marriage of tribal Indians according to tribal customs is lawful everywhere (6, 8), but only if the parties are under tribal jurisdiction and not subject to the laws of the state (17). If invalid where contracted and invalid under the law of the parties' domicil, a marriage is invalid everywhere (10); if valid where contracted and invalid under the law of the domicil, quaere (10). Where citizens of a state go beyond its jurisdiction and not into another state (as at sea) to contract a marriage in evasion of its laws, the marriage is fraudulent and void (11). The statute as to remarriage after divorce [see 515 under 4c], *not being penal but creating in the parties a personal incapacity, makes impossible anywhere a marriage in violation of its provisions (21, 22).*

7. SEX OFFENSES AND MARRIAGE

A subsequent marriage of the parties is a defense to prosecution for seduction of a chaste female (2076). *But an unaccepted offer to marry, made by the defendant after indictment, is no defense (30).*

OREGON CASES

1. State v. Eisen, 53 O. 297 (1909). **2.** Sturgis v. Sturgis, 51 O. 10 (1908). **3.** In re Flores, 249 Pac. 1097 (1926). **4.** Coleman v. Coleman, 85 O. 99 (1917). **5.** In re Estate of Megginson, 21 O. 387 (1891). **6.** Kalyton v. Kalyton, 45 O. 116 (1903). **7.** McBean v. McBean, 37 O. 195 (1900). **8.** Yakima Joe v. To-Is-Lap, 191 Fed. 516 (1910). **9.** Non-She-Po v. Wa-Win-Ta, 37 O. 213 (1900). **10.** Huard v. McTeigh, 113 O. 279 (1925). **11.** Holmes v. Holmes, Fed. Cas. 6638 (1870); 1 Abb. (U.S.) 525. **12.** Reed v. Harkrader, 264 Fed. 834 (1920). **13.** Bell v. Martin, 64 O. 519 (1913). **14.** State v. Locke, 77 O. 492 (1915). **15.** State v. Isenhart, 32 O. 170 (1898).

16. Leefield v. Leefield, 85 O. 287 (1917). **17.** In re Estate of Paquet, 101 O. 393 (1921). **18.** Routledge v. Githens, 118 O. 70 (1926). **19.** Alto v. State Industrial Accident Comm., 118 O. 231 (1926). **20.** In re De Force's Estate, 249 Pac. 632 (1926). **21.** McLennan v. McLennan, 31 O. 480 (1897). **22.** Hooper v. Hooper, 67 O. 187 (1913). **23.** State v. Leasia, 45 O. 410 (1904). **24.** Wallace v. McDaniel, 59 O. 378 (1911). **25.** Twigger v. Twigger, 110 O. 520 (1924). **26.** Ollschlager's Estate v. Widmer, 55 O. 145 (1909). **27.** Westfall v. Westfall, 100 O. 224 (1921). **28.** Smith v. Smith, 8 O. 100 (1879). **29.** Cole v. Cole, 97 O. 555 (1920). **30.** State v. Wise, 32 O. 280 (1897).

PENNSYLVANIA

REFERENCES: Digest of Pennsylvania Statute Law, 1920; Supplement, 1924; Laws of Pennsylvania, 1925, 1926 (extraordinary session), 1927; Reports through Volume 287 Pennsylvania State and 7 District and County Court.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Digest, unless the Supplement thereto is specifically cited, and to session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Pennsylvania section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—No persons shall be joined in marriage until a license shall have been obtained (14552; 14562), and where the parties intend solemnizing their own marriage the clerk of the orphans' court of the proper county shall first certify their right to do so (14552). *The statutory requirement for license is directory only (1, 2), and failure to procure a license does not invalidate a marriage (3, 4).*

b. Issuer.—License is obtained from the clerk of the orphans' court in the county where the marriage is performed (14552) or in the county wherein either party resided (14562).

c. Compensation of Issuer.—For issuing a marriage license, clerks of orphans' courts shall charge $2.50, $2.00 of which shall be for the use of the clerk and 50 cents for the state (L. 1925, No. 268), the clerk receiving in addition 50 cents for recording the certificate and oath of parental consent (14556). In certain counties clerks of orphans' courts receive salaries (6496; 6497; 6524; Sup. 6526b–11, as amended L. 1925, No. 227; Sup. 6526d–1; 16352, as amended L. 1927, No. 384), which compensation may be in lieu of all fees collected (6525, Sup. 6526b–1, Sup. 6526d–6), but in some cases the salary shall not exceed the amount of fees collected during the clerk's term (Sup. 6526b–11, as amended L. 1925, No. 227).

d. Personal Appearance by Candidates.—The parties shall apply for marriage license either separately or together (14556) and one or both of the applicants shall be identified to the satisfaction of the issuer (14562), or the parties either separately or together may appear before any magistrate, alderman, notary public, or justice of the peace of the township where either of them resides, who shall interrogate them under oath as would the clerk of court [see 14556 under 1k] who, upon receipt of the answers, may grant a license if satisfied that no legal objection exists (14556). [Note: The clerk shall furnish magistrates with all necessary blanks (14557).] *Penalty.* See 14557 under 1k. [The Attorney General has held (49 Pa. C.C. 326) that a notary public to whom application is made must reside in the same county in which license is to issue.—G.M.] *Though under a former statute both candidates had to appear and answer interrogations (5), since 1903 the clerk may issue license upon application of one of the candidates only (1).*

e. Advance Notice and Objections.—[No provision for advance notice.] The clerk refusing to issue a license in the case of application by mentally diseased or deficient, indigent, or intoxicated persons [see 14566 under 1h and 1k] shall certify the proceeding to the proper orphans' court, without formality or expense to the applicants, where the application shall be heard without jury by the judge whose finding shall be final that a license ought or ought not to issue (14567).

f. Minimum Age.—No licenses shall issue if either applicant be under sixteen years, unless the judge of the orphans' court authorizes issuance by the clerk in special cases where one or both of the persons shall be under sixteen (L. 1927, No. 44). *There is no statute allowing courts to decree a marriage void on the ground of minority (6).*

g. Parental Consent.—If either party be under twenty-one years the consent of the parent or guardian shall be given personally before the clerk or certified in writing attested by two adult witnesses and the signature properly acknowledged before an officer competent to receive acknowledgments, and when such minor has no guardian and the judge of the orphans' court is absent, the clerk thereof or his proper assistant may appoint a guardian for this purpose (14556), nothing in this act being construed to authorize the marriage of persons under legal age without the consent of parents or guardians (14568). *An orphans' court has even appointed a guardian to grant consent to the marriage of a girl under the age of consent where she was pregnant by a man charged with rape and her father refused consent to*

the marriage for personal reasons only, the man being fit (7). Penalty. See 14557 under 1k. *Regardless of statutory penalty, want of parental consent does not affect the validity of a marriage of a person over the age of consent (6, 8).* [Note: Any person taking a female under sixteen years without the consent of the person having legal custody of her person, for the purpose of marriage, shall be imprisoned for not more than five years, fined not exceeding $1000, or both (13241). *Though a female infant be over the age of consent, a confederacy to assist her to escape her father's control, with view to marry her against his will, is indictable as a conspiracy under the common law (9).] Certain decisions under a former statute subjecting to penalty an officiant who joined minors in marriage without parental consent seem to be of general application: Acting under a misconception of the age of the person married was no defense (10). Joining in marriage a female infant without parental consent was not excused by the fact that she may have been pregnant (11). A surviving mother was considered a parent in relation to the marriage of a minor even though there was also a legal guardian (12). Though a father who relinquished parental control over a minor could not maintain action for the penalty (13), the parent's moral unfitness to care for the child was no defense to action for the penalty (14).*

h. Mental and Physical Qualifications.—No license to marry shall be issued where either party is an imbecile, epileptic, or person of unsound mind (or under guardianship as such) or, at the time of application, is under the influence of an intoxicating liquor or narcotic drug (14566), and the application shall contain a statement that neither party is afflicted with a transmissible disease (14564). *Penalty.* See 14557 under 1k. [As to penalty for solemnizing marriage of one intoxicated, see 14551 under 2g.] [Note: Lunacy is a ground for divorce (9148).] *Though the marriage of a lunatic is absolutely void (15), mere weakness of mind and peculiarities of conduct will not invalidate a marriage if at the time thereof the person had sufficient capacity to understand the nature of the contract (16). In absence of a statute courts of equity in this state have no power to declare a marriage void for lunacy (17), and an orphans' court after consummation of a marriage cannot revoke on the ground of a party's lunacy the license authorizing the marriage (18). Antenuptial incontinence, even though misrepresented, is not cause for annulment (19, 20). [As to effect of fraud concerning pregnancy, epilepsy, and venereal disease, see* 4d.]

i. Form of License.—The license authorizes the marriage of the parties named, has attached two certificates (14552), and must state

that the parties are of full age and never before married, or must state the age of the minor and the fact of parental consent, or in case of previous marriage the number of such former marriages, the mode of dissolution, and if by divorce, the cause for which granted (14563). There is a special form for Quakers or other persons solemnizing their marriage themselves, the clerk certifying upon evidence that no impediment to the marriage exists (14552).

j. Record of License.—The clerk shall enter—immediately upon issuance of any marriage license (14554)—in the marriage license docket a complete record of the issuing of the license and all matters which he is required to ascertain relative to the rights of the parties to obtain a license, together with their ages and residence (14553), and shall file and record the certificate and oath of parental consent (14556) and the application for license (14564), the marriage license docket being open to public inspection (14554). *Penalty.* Any clerk neglecting to enter a marriage license immediately after issuance or failing to keep the docket open for inspection or prohibiting any person from making a copy of the entries shall be fined not exceeding $50 for each offense (14555). *There were formerly opposing opinions in lower courts as to whether the marriage license docket was open to public inspection without fee as a matter of right (21) or only as a matter of grace to those having a special interest (22).*

k. Other Provisions.—The clerk shall inquire of the applicants on oath relative to the legality of the contemplated marriage, the ages of the parties, consent of parents or guardians of such as are under twenty-one years, and any prior marriage and its dissolution, and if there be no legal objection may grant the marriage license (14556). [See 14556 under 1d.] Marriage license applications shall contain a statement of the name, color, occupation, birthplace, and residence of the parties and their parents, age of the parties, number of marriage, statement that neither party is afflicted with a transmissible disease, and such other facts as may be necessary to determine whether any legal impediment exists (14564). No marriage license shall be issued to any male who is, or has been within five years, an inmate of any county asylum for indigent persons unless it satisfactorily appears that the cause of such condition is removed and that he is physically able to support a family (14566). No license shall be valid for a longer period than sixty days from the date of issue (14566). *Penalty.* Any clerk issuing a marriage license in any other manner than as prescribed, or any magistrate, alderman, or justice of the peace wilfully making any false return, shall forfeit a

sum not exceeding $1000 to the party aggrieved (14557). *In passing judgment as to issuance of a license the clerk is acting in a judicial capacity (21). A license having served its purpose, so far as the validity of the marriage is concerned, when the marriage is consummated, upon facts outside the record a court has no authority to annul a license issued by its clerk (18).*

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by the mayor of a third class city (4277) or by the parties themselves (14552). [Though the marriage license is addressed to any minister of the gospel, justice of the peace, or other persons authorized by law to solemnize marriage (14552; 14563) and though fees for solemnization by justices of the peace, magistrates, and aldermen are provided (10732) and though judges, justices, and clergymen are incidentally mentioned as officiants (14551) [see also 14559 under 2c], there would seem to be no direct statutory provision as to who may solemnize marriages.—G.M.]

b. Officiant's Credentials.—No general provision. [Note: There is a special provision in Philadelphia for the registration of officiants' names and addresses with the local Board of Health (A. 1860, No. 146, §2).]

c. Presentation of License.—The license authorizes the solemnization of the marriage (14552; 14563). *Penalty.* If any minister, justice, or other person shall solemnize marriage or shall be attesting witness thereto without first having obtained the proper license, he shall forfeit $100 (14559).

d. Form of Ceremony.—Officiants are authorized to join persons in marriage according to the rites of their church and the laws of the commonwealth (14552). *A marriage is created where the parties in the presence of witnesses take each other as husband and wife, the man giving the woman a ring, and thereafter they cohabit (23).*

e. Common Law Marriage.—No statutory provision. *Marriage is a civil contract completed by words in the present time without regard to form (24, 25, 26, 27, 28, 29, 30, 31, 32, 33); a marriage valid according to the common law is valid notwithstanding statutory requirements inasmuch as the statute contains no express words of nullity (2, 3, 34). The validity of a marriage depending not upon formalities but upon consent (32), no ceremony is necessary (23, 25, 35) so long as there is an agreement to form a lawful relation of husband and wife (26,*

33, 36). To create the marriage contract there must be words in the present tense (37, 38, 39, 40) or words in the future tense followed by consummation (39, 40, dicta). The cohabitation following the words of future consent executes the contract (41) if the parties intend a present marriage and not a mere executory contract to marry (42), but cohabitation with intention of future marriage (43), or in reliance upon promise thereof, does not establish a common law marriage (44, 45).

Although cohabitation and reputation as husband and wife do not themselves constitute marriage (37, 46, 47, 48, 49, 50, 51), they do raise a presumption of a marriage contract (25, 28, 29, 33, 35, 40, 46, 48, 52, 53, 54, 55, 56, 57, 58), especially where legitimacy is concerned (59, 60). Both cohabitation and reputation are necessary to create the presumption (26, 61); the cohabitation must be matrimonial and the reputation general (23, 46, 62, 63, 64, 65). This presumption of marriage may be rebutted by proof that no marriage had in fact taken place (47, 58, 66) or that the parties intended a later formal ceremony (49, 57). An agreement to live together as husband and wife, followed by cohabitation and recognition as such, makes inadmissible any denial by one party in the absence of the other that the marriage relation existed (67).

There is never a legal presumption of marriage after removal of an impediment, but only an inference of fact (68); and as a relation illicit in origin is presumed to continue so, a marriage is not inferred from matrimonial cohabitation and reputation in absence of proof of a subsequent actual marriage (38, 47, 48, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77). Regardless of original good faith (71) the marriage contract, void because of the impediment, cannot be ratified (69, 70). But the illicit cohabitation may be changed into marriage after removal of the impediment by an actual verbal agreement to be husband and wife (31), by a declaration of marriage (78)—but quaere (24), or by cohabitation, reputation, recognition, and general conduct as husband and wife (52, 79), birth of children, et cetera (80, 81), especially where legitimacy is concerned (82,83).

f. Irregular Solemnization.—No statutory provision. *Common law marriages being recognized, a marriage is not invalid if celebrated by an officer having no legal authority to perform marriages (27).*

g. Other Provisions.—*Penalties.* Any judge, justice, or clergyman who shall perform the marriage ceremony when either party thereto is intoxicated shall be fined $50 and imprisoned not exceeding sixty days (14551; 14044). It shall be unlawful for any person to use any cannon, gun, or other explosive device at any serenade of a wedding (10962), and violation hereof is punishable by fine of from $25 to

$50, imprisonment of from thirty to sixty days, or both (10963). [Note: For marrying each couple and making certificate and return the fee shall be $5.00 (10732).]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The license shall have appended to it two certificates, the officiant giving one to the parties and returning the other to the issuer (14552; 14562) within thirty days after solemnization (14558). The certificate of a marriage solemnized by the parties themselves shall be signed by them, attested by two witnesses, and filed with the clerk (14558). *Penalty.* Every minister, justice, or other person neglecting to transmit the certificate to the clerk within the prescribed time shall forfeit $50 (14558). [Note: There is also a special provision in Philadelphia for quarterly returns of marriages to the local Board of Health, with penalty for failure, and special requirements as to record thereof and the evidenciary value of such records (A. 1860, No. 146, §§7, 8, 9, 10, 12).]

b. Local Record.—Immediately upon receipt of a certificate the clerk shall enter it on the docket where the corresponding marriage license is recorded (14558; 14562). *Penalty.* Any clerk neglecting to make such record shall forfeit $50 (14558). [Note: In third-class cities the board of health shall have power to maintain a system for the registration of marriages (4418).]

c. State Record.—The State Registrar of Vital Statistics shall collect and tabulate records of all marriages performed within the state (Sup. 9002). [Under the statutory authority to prepare necessary methods of obtaining marriage records (see 8985 under 5) the State Department of Health requires license issuers to submit annually copies of their records of marriages.—G.M.]

d. Evidence.—A certified copy of the record of marriage license and certificate shall be received in all courts as prima facie evidence of the marriage (14560). So too a copy of a marriage record properly certified by the State Registrar of Vital Statistics (9005). *A foreign record of marriage is not admissible if not complete (84) or not duly authenticated (85). An exemplified copy of the marriage license docket of another state is conclusive evidence only as to issuance of license and not as to facts which induced license issuance, such as the statement of a party's age (86).* The registry of any marriage kept by a religious society within this province shall be held authentic (10349). *A copy*

of a parish register in England, certifying a marriage, is proof of the marriage if the parties are identified (87). Though a certificate of marriage signed by the officiant is not by itself admissible (88), any paper setting forth the marriage, endorsed or acknowledged by a party to a marriage, is evidence of the marriage as against such party (73, 88, 89, 90). Marriage in Scotland, being extremely informal, need not be proved by certificate (91).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Such marriages are declared void (7907; 9141; 14548). *Though a marriage within the forbidden degrees is void (92, 93, 94, 95), its invalidity cannot be inquired into after the death of either spouse (92, 93, 96). Such marriages, being incestuous and void, will be dissolved regardless of whether the applicant is an innocent or injured party (97). Penalty.* Intermarriage within the forbidden degrees is punishable by fine not exceeding $500 and imprisonment not exceeding three years (7907). [The prohibition of marriage between first cousins was enacted in 1902 (14547) and though such marriages are void, they are not within the penalty provided for other forbidden marriages. Cohabitation under such void marriage might constitute fornication, however, punishable by fine not exceeding $100 (7865).—G.M.] *The prohibition of the marriage of first cousins in this state does not affect the validity of such marriages if lawful where contracted (98, 99 contra).*

b. Proper Civil and Racial Status.—No provision as to validity of marriage. [See 14566 under 1k.]

c. Proper Legal Status.—The marriage of a person having a spouse living at the time is absolutely void and may be so decreed upon action of the innocent or injured party (9143, as amended L. 1927, No. 49). *No valid marriage can be contracted during the subsistence of a prior marriage of one of the parties (83): such subsequent marriage is unlawful (38, 73) and absolutely void (4, 68, 69, 70, 72, 74, 78, 91, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112), does not change the female's status (101) or settlement (104), and constitutes no bar to a later marriage of the innocent spouse with a third person (91, 109, 111). The nullity is absolute, no matter the length of absence of the former spouse (100, 103, 108), so long as the prior marriage was actually subsisting at the time of the subsequent (113). But action for judicial dissolution of the subsequent marriage may be brought only by the innocent or injured party thereto (72, 106, 114, 115, 116,*

117, 118, 119). Though one is not an injured party if one knew of the spouse's prior, subsisting marriage (114, 117), one may be so if believing the other to have been divorced (119); great diligence in ascertaining the other's status is not necessary (120). Because of the statutory provision a spouse cannot treat the subsequent marriage as void ipso facto without court decree (121, 122, 123), but there is some question as to whether a conviction of bigamy does not itself free the other party to the bigamous marriage (124, 125, 126).

If any person who has married another, validly or not, during the life of the other and before dissolution or declaration of nullity of such marriage shall go through any form of marriage with any other person, he shall be fined not exceeding $1000, imprisoned not exceeding two years, or both, and where the first marriage shall be valid the second shall be bigamous and void, provided that if any spouse shall marry again upon false rumor, in appearance well founded, of the death of the other when such other has been absent for two whole years, he shall not be liable to the penalties (7710). *Bigamy is complete when the second marriage is contracted, regardless of immediate separation (127). A prosecution may be founded upon a voidable marriage if not judicially declared a nullity (81).* If a person marries again upon false rumor, apparently well-founded, of the death of the spouse who has been absent for two years, the returning absentee has the option within six months of his return to insist upon restoration of his spouse or to have his own marriage dissolved (9142). *The presumption of death arises after an absence of seven years (128) and allows the absentee's spouse validly to contract another marriage (115, 129, 130).*

After divorce the spouse who shall have been guilty of adultery shall not marry the person with whom such crime was committed during the lifetime of the other party (9191). *This statute prohibiting the marriage of a divorced person with his paramour not only makes such marriage absolutely void (131, 132, 81 contra) but imposes a personal incapacity which makes impossible anywhere the marriage of such persons so long as they are domiciled in this state (133, 134). But the statute applies only to forbid marriage with a person whom the divorce record shows to have had adulterous conduct with the divorced party, regardless of the allegations of such conduct in a later collateral proceeding (83). In absence of evidence of lack of dissolution of an earlier marriage there is a presumption in favor of the validity of a later ceremonial marriage (128, 135).*

d. Proper Consent of Parties.—*The consent of parties to an alleged marriage is to be determined by what took place at the time of its celebra-*

tion and is not affected by any secret reservation of one party (136, 137). Where the alleged marriage was procured by fraud, force, or coercion and has not been subsequently confirmed by the injured party, divorce may be granted (9144). *The fraud allowing of divorce must be such as to deceive a man of ordinary prudence (138) and must concern some matter in regard to the marriage relation itself (139). Thus misrepresentations as to birth, name, rank, fortune, health, or character do not constitute adequate fraud (139), nor does misrepresentation of the age of a minor in order to procure a license without parental consent (6), nor the intent of one party not to live with the other when the other knew of his unwillingness to marry (136). But there is adequate fraud in the concealment of venereal disease (140) or in the misrepresentation of race (141) or of freedom from epilepsy (142), if the fact is proved (141) and the innocent party deceived (142). Though false statements as to antenuptial chastity—the woman having in fact an illegitimate child—do not constitute fraud sufficient for divorce (20), concealment of antenuptial pregnancy by another man is such fraud regardless of express misrepresentations (19, 143). If the man himself has had antenuptial intercourse with the woman, the situation is different, and deception as to the fact of pregnancy (144) or as to his being its cause does not allow of annulment (145, 146, 147, 148, 149), for the man is either not deceived, knowing the woman's looseness of character (138, 150), or he acts merely to fulfill a moral duty (151, 152). But where a woman and man by whom she is pregnant conspire to entice another man to have intercourse with her so as to put on him the blame for her pregnancy, such man marrying her in the mistaken belief may obtain annulment for fraud notwithstanding his antenuptial relations with the woman (153).*

The duress allowing of divorce must exist at the time of the marriage ceremony (138), and though the coercion may be either physical or mental (154), it must consist of actual force or such threats of personal violence as to induce a well-founded fear of life or of great bodily harm (155) and must deprive the person forced of the benefit of action by free will (152, 154). It is not duress to persuade a person into marriage, though he be weak and old, if no unfair or illegal means are used (156). The coercion alone must cause the marriage (146). A marriage under legal arrest or threats thereof, being a voluntary alternative to prosecution, is not contracted under duress (146, 147, 157, 158). But a marriage is contracted under duress if extorted by means of an arrest, or threat of arrest, under a void process or false accusation without probable cause (144, 157, 159, 160, 161). Penalty. Any person pretending for gain to win the affections of any person whatever, for marriage or seduction, or making one person marry another,

shall be guilty of a misdemeanor (7872). [Note: Taking or detaining a female with intent to compel her marriage is punishable by imprisonment for not more than ten years (7993).] *Cohabitation after removal of the duress or discovery of the fraud may constitute ratification of the voidable marriage and preclude divorce* (*144, 149, 161*).

5. STATE SUPERVISION

The State Department of Health shall furnish to clerks a form for applications for marriage licenses which shall be uniform throughout the state (14565). The State Department of Health, charged with the thorough enforcement of the registration of marriages throughout the state, shall prepare necessary methods and forms for obtaining and preserving such records and for insuring faithful registration (8985).

6. INTERSTATE RELATIONS

No statutory provision. *The validity of a marriage is determined by the law of the place of contract* (*84, 162*); *if valid there it is valid everywhere* (*98, 162, 163, 164, 165, 166*), *even at the place of the parties' domicil, to evade whose laws the parties went elsewhere to be married* (*164*). *But the converse is not necessarily true: a marriage of citizens of a common law jurisdiction not valid where contracted is not always invalid at their domicil if good according to the common law* (*163, 165*). *And a foreign marriage, valid where contracted, will not be recognized at the domicil if contrary to a positive statute of the domicil, if offending to the policy and good morals of the domicil, or if contracted expressly in evasion of the law of the domicil* (*95, 99, 133, 134, 165*). *It is to be noted, however, that the Pennsylvania statute prohibiting the intermarriage of first cousins creates in its citizens no incapacity validly to contract such marriages elsewhere* (*98, 99 contra*), *and that the New York statute prohibiting remarriage after divorce has no extraterritorial effect upon marriages validly contracted in this state* (*164, 166*).

7. SEX OFFENSES AND MARRIAGE

No statutory provision. *Intermarriage of the parties after seduction is a defense against prosecution though followed by immediate desertion* (*167*).

PENNSYLVANIA CASES

1. Miller's Estate, 53 P.L.J. 321 (1906); affirmed, 34 S.C. 385 (1907). **2.** Gerson v. Oil City Trust Co., 28 Dist. 853 (1919). **3.** Biesecker's

Estate, 7 Dist. 70 (1898). **4.** Hornbake v. Hornbake, 72 S.C. 605 (1919). **5.** Moore v. McClelland, 1 C.C. 555 (1885). **6.** Seibert v. Seibert, 3 D. and C. 142 (1923). **7.** In re Petition of Leber, 20 Lanc. Rev. 304 (1903). **8.** Beelman v. Roush, 26 St. 509 (1856). **9.** Mifflin v. Comm., 5 W. and S. 461 (1843). **10.** Donahue v. Dougherty, 5 Rawle 124 (1835). **11.** Macklin v. Taylor, Addison 212 (1794). **12.** Buchanan v. Thorn, 1 St. 431 (1845). **13.** Stansbury v. Bertron, 7 W. and S. 362 (1844). **14.** Robinson v. English, 34 St. 324 (1859). **15.** Newlin's Estate, 231 St. 312 (1911); affirming 11 Del. Co. Rep. 409 (1910). **16.** Nonnemacher v. Nonnemacher, 159 St. 634 (1894). **17.** Pitcairn v. Pitcairn, 201 St. 368 (1902). **18.** Phoutz's Estate, 40 S.C. 130 (1909). **19.** Allen's Appeal, 99 St. 196 (1881). **20.** Rothman v. Rothman, 21 Dist. 245 (1912).

21. Marriage License Docket, 4 Dist. 162 (1895). **22.** Marriage License Docket No. 2, 4 Dist. 284 (1894). **23.** Brinckle v. Brinckle, 12 Phila. 232 (1877). **24.** Hantz v. Sealy, 6 Binney 405 (1814). **25.** Guardians of the Poor v. Nathans, 2 Brewst. 149 (1845). **26.** Comm. v. Stump, 53 St. 132 (1866). **27.** Comm. v. Reynolds, 8 Lanc. Bar 57 (1876). **28.** Comm. v. Cronin, 13 W.N.C. 76 (1883). **29.** Comm. v. Haylow, 17 S.C. 541 (1901). **30.** Neafie's Estate, 12 Dist. 749 (1903). **31.** Griffith's Estate, 29 Dist. 358 (1920); also, 49 C.C. 242. **32.** Wandall's Estate, 29 Dist. 1132 (1920). **33.** Craig's Estate, 273 St. 530 (1922); affirming 30 Dist. 521 (1921). **34.** Fulkerson v. Day, 15 Phila. 638 (1880?). **35.** Ashmead's Estate, 29 Dist. 128 (1920). **36.** Estate of Lorah, 7 Berks Co. L.J. 217 (1915). **37.** Tholey's Appeal, 93 St. 36 (1880). **38.** Wertzel [Weitzel] v. Central Lodge No. 19, A.O.U.W., 1 Dist. 143 (1892); also, 11 C.C. 269. **39.** Richard v. Brehm, 73 St. 140 (1873). **40.** Cunningham's Estate, 13 Berks Co. L.J. 178 (1921).

41. Comly's Appeal, 6 Dist. 119 (1897); affirmed, 185 St. 208 (1898). **42.** Hines's Estate, 7 Dist. 89 (1898); affirmed, 10 S.C. 124 (1899). **43.** Gross's Estate, 9 Dist. 76 (1899). **44.** Bott's Estate, 10 Dist. 122 (1901). **45.** Comm. v. Dando, 19 Luz. L. Reg. Rep. 153 (1916). **46.** Yardley's Estate, 75 St. 207 (1874). **47.** Hunt's Appeal, Jackson's Estate, 86 St. 294 (1878). **48.** Appeal of Reading Fire Ins. and Trust Co., 113 St. 204 (1886). **49.** In re Estate of Grimm, 35 P.L.J. 213 (1888); affirmed, 131 St. 199 (1890). **50.** Inners' Estate, 19 York L. Rec. 166 (1906). **51.** Comm. v. Gray, 72 S.C. 279 (1919). **52.** Physick's Estate, 2 Brewst. 179 (1862). **53.** Brice's Estate, 2 W.N.C. 112 (1875); 11 Phila. 98. **54.** Seibert's Estate, 17 W.N.C. 271 (1886); also, 1 C.C. 229. **55.** Janney's Estate, 2 Dist. 145 and 408 (1892); also, 12 C.C. 550. **56.** Knecht

v. Knecht, 261 St. 410 (1918). **57.** Estate of Phanenschmidt, 35 Montg. Co. L. Rep'r 135 (1919). **58.** Bisbing's Estate, 74 S.C. 317 (1920); appeal dismissed, 266 St. 529. **59.** Leaming's Estate, 10 Dist. 389 (1901). **60.** Homeyard's Estate, 10 Dist. 730 (1901).

61. Callery's Estate, 226 St. 469 (1910). **62.** Schellinger's Appeal, 6 Leg. Gaz. 39 (1874). **63.** Estate of Green, 19 Phila. 55 (1888); also, 5 C.C. 605. **64.** Estate of Smith, 3 Lack. L.N. 122 (1895). **65.** Patterson's Estate, 237 St. 24 (1912). **66.** Edwards v. Enterprise Mfg. Co., 283 St. 420 (1925). **67.** Moore's Estate, 9 C.C. 338 (1890). **68.** Adose v. Fossit, 1 Pears. 304 (1867). **69.** Rumpff v. Vichestein, 3 Pitts. 148 (1869). **70.** Estate of Metz, 12 Phila. 126 (1878). **71.** Hunt v. Cleveland, 6 C.C. 592 (1889). **72.** Jones v. Jones, 4 Dist. 223 (1895). **73.** King's Estate, 9 Kulp, Luz. Leg. Reg. Rep. 54 and 56 (1897). **74.** Comm. v. Brown, 28 Lanc. L. Rev. 65 (1911). **75.** Comm. v. King, 48 C.C. 476 (1919). **76.** Comm. v. McDermott, 75 S.C. 408 (1921). **77.** Comm. v. Phillips, 83 S.C. 213 (1924). **78.** Topham's Estate, 12 Dist. 194 (1903); also, 28 C.C. 374. **79.** Thewlis's Estate, 15 Dist. 361 (1906); affirmed, 217 St. 307 (1907). **80.** Staiger's Estate, 7 Dist. 351 (1898).

81. Comm. v. Frey, 27 Dist. 242 (1917). **82.** Murray's Estate, 15 Dist. 542 (1906). **83.** Beegle's Estate, 64 S.C. 180 (1916). **84.** Comm. v. Burton, Vaux 83 (1843). **85.** Bergdoll's Estate, 7 Dist. 137 (1898). **86.** Ohlweiler v. Ohlweiler, 72 S.C. 518 (1919). **87.** Winder v. Little, 1 Yeates 152 (1792). **88.** Hill v. Hill's Adm'r., 32 St. 511 (1859). **89.** Vincent's Appeal, 60 St. 228 (1869); known also as De Amarelli's Estate, 2 Brewst. 239. **90.** Dailey v. Frey, 206 St. 227 (1903). **91.** In the matter of Shaak's Estate, 2 Pears. 531 (1876?); also, 4 Brewst. 305 (1867?); 3 Pittsb. R. 275 (1870). **92.** Parker's Appeal, 44 St. 309 (1863). **93.** Walter's Appeal, 70 St. 392 (1872). **94.** Foust v. Foust, 14 Just. L. Rep'r. 10 (1915). **95.** U.S. ex rel. Devine v. Rodgers, 109 Fed. 886 (1901). **96.** Ninehouser's Estate, 20 Dist. 969 (1911). **97.** McClain v. McClain, 40 S.C. 248 (1909). **98.** Schofield v. Schofield, 20 Dist. 805 (1910); affirmed, 51 S.C. 564 (1912). **99.** Oyer v. Oyer, 71 P.L.J. 137 (1922). **100.** Kenley v. Kenley, 2 Yeates 207 (1797).

101. Heffner v. Heffner, 23 St. 104 (1854). **102.** Howard v. Lewis, 6 Phila. 50 (1865); also, 22 Leg. Int. 245. **103.** Thomas v. Thomas, 124 St. 646 (1889). **104.** Wayne Township v. Porter Township, 138 St. 181 (1890). **105.** Culver's Estate, 7 Kulp, Luz. Leg. Reg. Rep. 219 (1893). **106.** Heinzman v. Heinzman, 4 Dist. 225 (1894); also, 15 C.C. 669. **107.** Comm. v. Mudgett, alias Holmes, 4 Dist. 739 (1895); affirmed, 174 St. 211 (1896). **108.** Clark's Estate, 173

St. 451 (1896). **109.** Klaas v. Klaas, 14 S.C. 550 (1900). **110.** Mores v. Mores, 6 Westmld. L.J. 49 (1901). **111.** Comm. v. Bernard, 11 Dist. 156 (1902); also, 27 C.C. 13. **112.** Gosper's Estate, 24 Lack. Jur. 188 (1922). **113.** Denny v. Denny, 71 P.L.J. 794 (1923). **114.** Thompson v. Thompson, 10 Phila. 131 (1874); also, 31 Leg. Int. 124. **115.** O'Keefe v. O'Keefe, 15 C.C. 88 (1894). **116.** Skellie v. Lehr, 17 Dist. 585 (1907); also, 35 C.C. 249. **117.** Smith v. Smith, 64 P.L.J. 549 (1916). **118.** Baker v. Baker, 4 D. and C. 713 (1924); affirmed, 84 S.C. 544 (1925). **119.** Clark v. Jones, 13 Berks Co. L.J. 279 (1921). **120.** Graham v. Graham, 9 Leh. Co. L.J. 194 (1920).

121. Griffith v. Smith, 1 Clark, Pa. L.J. Rep. 479 (1843). **122.** Linden v. Kelly, 6 W.N.C. 95 (1878). **123.** Hoodmacher v. Hoodmacher, 4 Kulp, Luz. Leg. Reg. Rep. 352 (1887). **124.** Harrison v. Harrison, 1 Phila. 389 (1852). **125.** Comm. v. Kaiser, 24 Dist. 74 (1914); also, 42 C.C. 190. **126.** Hullman v. Kauffman, 16 Del. Co. Reps. 398 (1923). **127.** Gise v. Comm., 81 St. 428 (1876). **128.** Estate of Williams, 13 Phila. 325 (1880); also, 37 Leg. Int. 104. **129.** Miller v. Jacobs, 18 Montg. L.R. 185 (1902). **130.** Wilhelm's Estate, 23 Dist. 757 (1914). **131.** Adams v. Adams, 2 Chester Co. Rep. 560 (1885). **132.** Kennedy v. Orem, 15 Dist. 329 (1905). **133.** Stull's Estate, Morehouse's Appeal, 183 St. 625 (1898). **134.** Immendorf's Estate, 7 Dist. 449 (1898). **135.** Hilton's Estate, 263 St. 16 (1919). **136.** Barnett v. Kimmell, 35 St. 13 (1859). **137.** Torrence's Estate, 47 S.C. 509 (1911); affirming 57 P.L.J. 203 (1909). **138.** Long v. Long, 15 North. Co. Rep'r. 157 (1915). **139.** Ayres v. Ayres, 64 P.L.J. 724 (1916). **140.** Dunbar v. Dunbar, 68 P.L.J. 68 (1917).

141. King v. King, 70 P.L.J. 1086 (1921). **142.** Bolibaugh v. Bolibaugh, 46 C.C. 407 (1918). **143.** Coffman v. Coffman, 42 C.C. 55 (1914). **144.** Richards v. Richards, 19 C.C. 322 (1897). **145.** Bartholomew v. Bartholomew, 3 Dist. 557 (1893); also, 14 C.C. 230. **146.** Davis v. Davis, 25 Montg. Co. L.R. 127 (1909). **147.** Rapp v. Rapp, 2 Berks Co. L.J. 63 (1909). **148.** Anderson v. Anderson, 40 C.C. 288 (1912). **149.** Schwindt v. Schwindt, 66 S.C. 217 (1917). **150.** Reifsnyder v. Reifsnyder, 3 Berks Co. L.J. 68 (1910). **151.** Hoffman v. Hoffman, 30 St. 417 (1858). **152.** Todd v. Todd, 24 W.N.C. 31 (1889); affirmed, 149 St. 60 (1892). **153.** Clark v. Clark, 25 Dist. 942 (1915); also, 43 C.C. 577. **154.** Malaniak v. Malaniak, 72 P.L.J. 815 (1924). **155.** Stevenson v. Stevenson, 7 Phila. 386 (1870). **156.** Eby v. Eby, 69 S.C. 323 (1918). **157.** Brant v. Brant, 17 Phila. 655 (1884); also, 41 Leg. Int. 54. **158.** Giacchi v. Giacchi,

65 P.L.J. 201 (1917). **159.** Collins v. Collins, 2 Brewst. 515 (1869). **160.** Pyle v. Pyle, 10 Phila. 58 (1873). **161.** Murray v. Murray, 29 Dist. 257 (1920). **162.** Moul's Estate, 1 York Leg. Rec. 185 (1880). **163.** Phillips v. Gregg, 10 Watts 158 (1840). **164.** Van Storch v. Griffin, 71 St. 240 (1872). **165.** City v. Williamson, 10 Phila. 176 (1873). **166.** In re Application of Foerst and Hausbeck for Marriage License, 57 P.L.J. 538 (1907). **167.** Comm. v. Eichar, 4 Clark, Pa. L.J. Rep. 326 (1878).

RHODE ISLAND

REFERENCES: General Laws of Rhode Island, 1923; Acts and Resolves of Rhode Island, 1923, 1924, 1925, 1926, 1927; Reports through Volume 46 Rhode Island, and 2 Rhode Island Decisions.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the General Laws and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Rhode Island section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Persons intending to be joined together in marriage in this state must first obtain a license (4164, as amended A. 1927, ch. 1064).

b. Issuer.—Licenses are obtained from the clerk of the town or city in which the parties reside, or in which each respectively resides, or if non-residents, in which the marriage is to be solemnized (4164, as amended A. 1927, ch. 1064). In Providence the Registrar of Births, Deaths, and Marriages has all the duties elsewhere performed by the town and city clerks (4169).

c. Compensation of Issuer.—The fee of the town or city clerk for license issuance is $2.00, except where the parties live in different towns in the state the fee shall be $1.00 in each (4164, as amended A. 1927, ch. 1064). [It would seem that in towns the clerk retains this fee, but by the charters of the several cities the city clerks are on salary in lieu of all other compensation. In Providence the city council fixes the salaries of city officers (A. 1927, ch. 1074).—G.M.]

d. Personal Appearance by Candidates.—Each of the parties shall subscribe to the truth of the information given in the presence of the clerk or an assistant clerk of the town in which they respectively reside (4164, as amended A. 1927, ch. 1064).

e. Advance Notice and Objections.—If the woman is not a resident of this state she shall fill and sign the license at least five days previous to the marriage, and the town or city clerk shall keep the license in his possession until the sixth day after such filling and signing (4164, as amended A. 1927, ch. 1064). A female immigrant arriving in any port in this state from a foreign country may obtain a license at any time before her marriage (4178). [As to objections to solemnization, see 4172 under 2g.]

f. Minimum Age.—No provision as condition to license issuance. [Note: A second marriage after a former marriage made when the man was less than fourteen or the woman less than twelve years does not give rise to bigamy (6145).]

g. Parental Consent.—No minor—a person under twenty-one years (5421)—or person under the control of a parent or guardian can give the information required for a license or shall receive the license unless the consent in writing of the parent or guardian is given before the town or city clerk, except that this is not required for a resident over eighteen years having no competent parent or guardian in the state or for such non-resident having none within the United States, or for any minor resident upon the written consent given before the town or city clerk by the overseer of the poor where the minor resides (4165). *Whether the marriage of a person under guardianship is void like other contracts of such a person contracted in Rhode Island, quaere (1).* [*As to such marriage outside the state, see* 6.]

h. Mental and Physical Qualifications.—[No provision as condition to license issuance.] All marriages where either party shall be an idiot or lunatic at the time thereof shall be absolutely void and the issue illegitimate (4159, as amended A. 1927, ch. 1066).

i. Form of License.—The license contains the names of the parties, residence, age, race, place and date of birth, occupation of groom, parents' names and birthplace, fathers' occupation, previous marriages, and method and date of their termination, the truth of the information being certified by the parties. It also shows the place wherein the license may be used,—the state, if the party is a resident of Rhode Island, or the town or city, if a non-resident (4164, as amended A. 1927, ch. 1064).

j. Record of License.—The town and city clerks shall record the information contained in the license (4168).

k. Other Provisions.—Before a license shall be issued to a person previously married and divorced, such person shall present to the town or city clerk an authenticated copy of the divorce decree (4164, as amended A. 1927, ch. 1064). The license shall be valid for three months after issuance, at the expiration of which period an unused license shall be returned to the issuer (4164, as amended A. 1927, ch. 1064). *Penalty.* Whoever shall give or procure to be given any false information in the license application, or shall be married without duly proceeding as required by this chapter on marriage, shall be fined not exceeding $50 (4176).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by every ordained minister or elder, by every justice of the supreme or superior court, by every justice, every associate justice, and every clerk of a district court, by wardens of the town of New Shoreham in that town (4161; 4162), and among Quakers and persons professing the Jewish religion according to their rites (4163). [Note: The words "minister" and "elder" shall include all persons connected with the Society of Friends or the Jewish religion who, according to their rites, perform or have charge of the marriage ceremony (4163). As used in this Rhode Island digest the word "officiant" includes such "ministers" and "elders."—G.M.]

b. Officiant's Credentials.—No minister or elder shall join persons in marriage until he shall have obtained a clergyman's license, obtained, in case of a resident, from the clerk of the town or city wherein such minister or elder resides, and in case of a non-resident who is pastor of any church in this state or of a church outside the state adjacent to any city or town in the state in which more than half the members of the church reside, from the secretary of the State Board of Health, the fee being $1.00. The clerk or secretary shall record the name, residence, and denomination of the clergyman and the name of the parish. The clerks shall furnish lists of licensed clergymen to the secretary and the secretary to the clerks (4160, as amended A. 1927, ch. 1005; 2353).

c. Presentation of License.—No officiant shall join persons in marriage until they have presented the license (4166), as they are required to do (4164, as amended A. 1927, ch. 1064), and a certificate containing the information required for the marriage record (2344). [See 1i.] *Penalty.* An officiant joining persons in marriage without

first receiving the license containing the information required shall be imprisoned not exceeding six months or fined not exceeding $1000 (4173).

d. Form of Ceremony.—The solemnization shall be in the presence of at least two witnesses besides the officiant (4171; 4167, as amended A. 1927, ch. 1064). Quakers and persons professing the Jewish religion may solemnize marriage according to their rites (4163).

e. Common Law Marriage.—*Penalty.* Whoever shall be married without duly proceeding as is required by this chapter on marriage shall be fined not exceeding $50 (4176). *The statutes do not declare marriage without solemnization to be void (2), in absence of which declaration the requirements for license, solemnization, and registration are directory only (3, 4) and common law marriages are valid (3, 4, 5, 6). To constitute a common law marriage there must be a present consent to become husband and wife (2, 6); an agreement* per verba de futuro cum copula *is but prima facie evidence of such present consent (2) which must not be conditional upon a future act or formal ceremony (2, 6). Matrimonial intent may be evidenced by cohabitation and reputation as husband and wife (3), both elements being necessary (7), if the cohabitation is matrimonial and the repute general and uniform (8).*

If the parties intend their cohabitation to be matrimonial but an impediment exists to their marriage, upon removal of the impediment the presumption of marriage may arise from continued cohabitation as husband and wife (3). Even if the relation was originally illicit because of an impediment, after its removal announcement by the parties and recognition of the marriage relation may show a present consent to marriage (5).

f. Irregular Solemnization.—The validity of a marriage otherwise lawful solemnized before a person professing to be an authorized officiant, or among Quakers or persons of Jewish faith according to their respective rites, shall not be affected by any want of jurisdiction or authority in such person or society or by reason of non-compliance with the requirements of this chapter on marriage, if performed with the belief of the parties, or either of them, that they have been lawfully married (4176). *Penalty.* Every person solemnizing a marriage without being legally authorized thereto shall be fined $500 (4177). [Note: A person wilfully sending to a newspaper a fraudulent notice of marriage shall be fined not exceeding $100 (6171).]

g. Other Provisions.—Any person with lawful objection to the marriage may state it in writing to the officiant who shall proceed no

further in the marriage until such lawful objection is removed (4172). *Penalties.* Every officiant joining persons in marriage when the solemnization has been lawfully objected to and the impediment not removed shall be imprisoned not exceeding six months or fined not exceeding $1000 (4173). Every authorized officiant failing to perform any of the duties devolved upon him by this chapter on marriage shall be fined not exceeding $100 (4174). Every authorized officiant knowingly solemnizing a bigamous marriage shall be imprisoned not exceeding six months or fined not exceeding $1000 (4175).

THE MARRIAGE RECORD

a. Marriage Certificates.—Every officiant shall endorse on the back of the license the fact of the marriage between the parties, the date, and witnesses thereto, and within forty-eight hours thereafter shall return the endorsed license to the clerk of the town or city in which such marriage was solemnized (4167, as amended A. 1927, ch. 1064; 2344). [As to Providence, see 4169 under 1b.] *Penalties.* Every officiant failing to perform the duties imposed by the chapter on registration shall be fined from $10 to $50 for each offense, one-half to the use of the town and one-half to the person complaining (2352). [See also 4174 under 2g.]

b. Local Record.—The town or city clerk or person whom the town council shall appoint as local registrar shall file and preserve a copy of the returns of marriages received, in such manner as directed by the secretary of the State Board of Health (4170; 2341). [As to Providence, see 4169 under 1b.] A town clerk or local registrar learning of a marriage occurring in his town which has not been returned as required shall record the facts learned (2363). The clerk or registrar of the town where marriages of non-residents take place shall transmit each month to the clerk or registrar of the town of residence of such persons certified copies of such marriages, which such clerks or registrar upon receipt shall record (2356; 2359). *Penalty.* Every town clerk or other person failing to perform the duties imposed by the chapter on registration shall be fined from $10 to $50 for each offense, one-half to the use of the town and one-half to the person complaining (2352). [Note: Complaints for violations of this chapter may be made by the secretary of the State Board of Health (A. 1926, ch. 763).]

c. State Record.—The town clerk or local registrar each month shall transmit to the secretary of the State Board of Health all original certificates registered by him and a list of the persons legally

required to make returns who have failed to do so (2341), as well as a report of additions and corrections (2363). The secretary of the State Board of Health shall preserve the returns with alphabetical indices, and annually shall make a report thereof which shall be published (2342, as amended A. 1923, ch. 2321). *Penalty.* See 2352 under 3b.

d. Evidence.—A certified copy of the record of marriage in custody of a town or city clerk or registrar is admissible as evidence of such marriage (2355). *Marriage may be proved by the marriage record and marriage certificate (9) even if such certificate was not recorded (10), but the only sort of record which is admissible is that sort which the law appointed the clerk to keep, a record of the officiant's certificate and not a record made upon the clerk's own knowledge (11).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (4155; 4156). Marriages within the prohibited degrees shall be null and void and the issue illegitimate (4157), but these prohibitions shall not extend to marriages among Jews within the degrees allowed by their religion (4158). *Penalty.* Persons intermarrying within the degrees of consanguinity within which marriage is prohibited shall be imprisoned not exceeding ten years (6153). [The marriage of persons within the prohibited degrees of affinity being void, cohabitation thereunder would be fornication, punishable by fine not exceeding $10 (6153).—G.M.]

b. Proper Civil and Racial Status.—No provision.

c. Proper Legal Status.—Marriages where either party has a former spouse living and not divorced by final decree shall be absolutely void and the issue illegitimate (4159, as amended A. 1927, ch. 1066). *The marriage of a person already married is void absolutely (3, 12, 13), will be so decreed (13), and gives no right to dower or permanent alimony (12).* [Note: The validity of any marriage which might heretofore have been deemed void because a former spouse was living but divorced by final decree may be established by decree of court if otherwise lawful (A. 1927, ch. 1066).] *Penalty.* Bigamy is punishable by imprisonment of from one year to five years or fine not exceeding $1000, but this does not extend to a person whose spouse has continually remained without the state for seven years together, the party marrying not knowing the other to be living within that time, nor to a person divorced or where the former marriage was contracted when the man was under fourteen and the

woman under twelve years of age (6145). [As to penalty for knowing solemnization of a bigamous marriage, see 4175 under 2g.] *A second marriage is necessary to a bigamy prosecution* (*14*). *Exceptions to the statute, being matters peculiarly within the knowledge of the defendant, need not be negatived in the indictment* (*15*). After final decree of divorce either party may marry again, but no decree shall become final until six months after decision (4230). [As to requiring divorce decree for license to marry, see 4164 under 1k.]

d. Proper Consent of Parties.—No statutory provision.

5. STATE SUPERVISION

The blank forms for record of marriages shall be furnished by the secretary of the State Board of Health (2343), and may be varied by him from time to time and additional information required (2357). [As to directions for preservation of local records, see 2341 under 3b. As to complaints for violations of registration provisions see A. 1926, ch. 763 under 3b. As to state record of officiants' credentials, see 4160 under 2b.]

6. INTERSTATE RELATIONS

No statutory provision. *Capacity to marry depends upon the law of the place of contract, not that of the parties' domicil, and a marriage valid where contracted will be recognized as valid at the domicil unless contrary to its good morals or public policy* (*1*). *The marriage of a ward without consent of the guardian, even if void if contracted here, is valid if valid where contracted* (*1*).

RHODE ISLAND CASES

1. In re Chace, Petitioner, 26 R.I. 351 (1904). **2.** Peck v. Peck, 12 R.I. 485 (1880). **3.** Holgate v. United Electric Rys. Co., 133 Atl. 243 (1926); affirming 1 R.I. Dec. 22 (1924). **4.** Mathewson v. Mathewson, 18 R.I. 456 (1894). **5.** Ibello v. Sweet, 133 Atl. 801 (1926). **6.** United States v. Dorto, 5 Fed. (2d) 596 (1925); affirming Dorto v. Clark, 300 Fed. 568 (1924). **7.** Odd Fellows Beneficial Ass'n v. Carpenter, 17 R.I. 720 (1892). **8.** Williams v. Herrick, 21 R.I. 401 (1899). **9.** R.I. Hospital Trust Co. v. Thorndike, 24 R.I. 105 (1902). **10.** State v. Tillinghast, 25 R.I. 391 (1903). **11.** Viall v. Smith, 6 R.I. 417 (1860). **12.** Leckney v. Leckney, 26 R.I. 441 (1904). **13.** Lynch v. Lynch, 34 R.I. 261 (1912). **14.** Watson, Petitioner, 19 R.I. 342 (1896). **15.** State v. Gallagher, 20 R.I. 266 (1897).

SOUTH CAROLINA

REFERENCES: Code of Laws of South Carolina (three volumes), 1922; Acts of South Carolina, 1922, 1923, 1924, 1925, 1926, 1927; Reports through Volume 136.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Civil Code—Volume III of the Code—unless the Criminal Law is specifically cited, and to session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this South Carolina section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—It shall be unlawful for any person to contract matrimony within this state without first procuring a license (5523; Crim. L. 379), but nothing herein contained shall render any marriage illegal without the issuance of a license (5528).

b. Issuer.—License for marriage shall be issued by the judge of probate except in the counties of Colleton, Darlington, Georgetown, Horry, Oconee, and Sumter, where license shall be issued by the clerk of the court (5524).

c. Compensation of Issuer.—The judge of probate shall issue a marriage license upon payment of $1.00—except in two counties where the fee is $1.25 (5750, as amended A. 1924, No. 675)—of which fee the probate judge generally retains 25 cents as his compensation and pays the remainder into the county treasury, except that in some 11 counties he retains 50 cents and in 15 others the entire fee (5524). County officials in certain counties receive salaries in lieu of all fees (A. 1921, No. 100; A. 1922, No. 508; A. 1923, No. 81; A. 1925, Nos. 47, 107; A. 1926, No. 510).

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—No license shall be issued when the female is under fourteen or the male under eighteen years (5524). *Penalty.*

See Crim. L. 474 under 1k. [As to exception from the penalty for bigamy of a person whose first marriage was contracted under the age of consent, see Crim. L. 374, under 4c. As to declaration of nullity, see 5532 under 4d.] *Though it has been thought that the marriage of a person under the common law age of consent, fourteen or twelve years, is absolutely void (1, dictum) or at least subject to disaffirmance without judicial decree (2, dissent), it has been held that, though the common law ages still apply in this state, the marriage of an eleven-year-old girl is voidable merely, that a court decree is necessary, and that cohabitation would bar action (2).*

g. Parental Consent.—When either party is under eighteen years and resides with the parent or guardian, the probate judge shall not issue a license until the written consent of such parent or guardian shall first be delivered to him (5524). *Penalty.* See Crim. L. 474 under 1k. [Note: Whoever shall take away any girl under sixteen years or, against the will or unknown to the parent having custody, shall contract marriage with any such child is punishable by imprisonment for five years or fine as adjuged by the court (Crim. L. 373).]

h. Mental and Physical Qualifications.—[No provision as condition to license issuance.] Persons not idiots or lunatics may lawfully contract matrimony (5522). [As to declaration of nullity, see 5532 under 4d.] *To be able to contract marriage one must have the regular use of the understanding sufficient to deal with discretion in the ordinary affairs of life, for want of which a marriage is void (3). Thus actual insanity, as from delirium tremens, will avoid a marriage (4). But the previous finding of an inquisition of lunacy, though prima facie evidence of capacity at the time of marriage, is not conclusive of incapacity (5), and possibly the imbecility necessary to incapacitate one from marriage must be greater than that necessary to preclude one from a contract concerning one's estate (6).*

i. Form of License.—The license shows the names, residences, ages, race, and nationality of the parties, avers their legal capacity to marry, and on the back contains a certificate to be filled out by the officiant and signed by both parties (5525).

j. Record of License.—No provision for recording of license until its return after marriage. [See 3b.]

k. Other Provisions.—The judge of probate shall issue a license upon a statement under oath that the parties are legally capacitated

to marry, together with the full names of the persons, their ages and places of residence (5524). *Penalty.* Any clerk of the court or probate judge wilfully failing to perform all the duties required of him by law, in addition to his liability to the party aggrieved, shall be fined not exceeding $500 (Crim. L. 474).

2. SOLEMNIZATION

a. Officiant.—Marriage ceremonies may be performed by ministers of the gospel or accepted Jewish rabbis and by officers authorized to administer oaths in this state (5530). *Under a colonial statute laymen were forbidden to solemnize marriages* (*7*).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—It shall be unlawful for anyone to perform the marriage ceremony without a license being delivered to him authorizing the marriage (5523; Crim. L. 379). *Penalty.* Any person performing a marriage ceremony without the production of such license shall be punished by fine of from $25 to $100 or imprisonment of from ten to thirty days (5523; Crim. L. 379).

d. Form of Ceremony.—No provision.

e. Common Law Marriage.—Nothing contained in the chapter on marriage shall render any marriage illegal without the issuance of a license (5528). *Marriage is a civil contract requiring nothing but a present agreement of the parties with an intention that such agreement itself shall constitute marriage* (*8*, *9*, *10*, *11*, *12*). *Marriage may be contracted either* per verba de praesenti *without cohabitation* (*8*, *13*, *14*) *or* per verba de futuro cum copula (*10*, *13*). *A contract* per verba de futuro *is presumed to become an executed contract of marriage only if the parties intend the copula itself to signify an execution of the previous agreement* (*10*), *a concluding of their contract* (*8*), *and hence there can be no presumption of marriage* per verba de futuro *where the copula does not follow the promise but an already subsisting cohabitation merely continues* (*15*). *Mere acknowledgment of marriage is not conclusive thereof* (*8*), *and subsequent cohabitation and reputation as husband and wife will not transform a meretricious relation into marriage* (*11*).

Where there is in the minds of both parties the desire for actual, lawful marriage when they contract a ceremonial marriage, but an impediment exists to the marriage of one of them and, such desire continuing, they live together as husband and wife after removal of the impedi-

ment, a valid marriage is constituted from the time of the removal of the impediment (16).

f. Irregular Solemnization.—*Penalty.* Whoever, with intent to defraud, shall pretend to be and act as a state, county, or municipal officer shall be guilty of a misdemeanor and punishable by fine or imprisonment or both in the discretion of the court (Crim. L. 66). [This provision would seem to include fraudulent solemnization of marriage under guise of civil authority.—G.M.]

g. Other Provisions.—*Penalty.* Any authorized officiant knowingly uniting in matrimony any persons of different races shall be punished by a fine of not less than $500, imprisonment for not less than twelve months, or both (Crim. L. 378). [As to what races may not intermarry, see 5536 under 4b.]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—Marriage license certificates shall be issued in duplicate, the officiant filling them out as now required by law and delivering one copy to the contracting parties and the other to the issuer (A. 1924, No. 694). The officiant shall fill out the certificate of marriage and within fifteen days shall return it to the issuer (5526). *Penalty.* Any violation shall be punished in accordance with the law now in force (A. 1924, No. 694). [Regardless of this provision there would seem to be no statute punishing the officiant for failing to make the required return.—G.M.]

b. Local Record.—The probate judge shall record and index the license and certificate in a book kept for that purpose (5526). *Penalty.* See Crim. L. 474 under 1k.

c. State Record.—No provision.

d. Evidence.—The certificate and record of marriage, properly signed and certified, is sufficient evidence in all courts of the contract of marriage (5529). *A marriage license, proved by the lawful custodian, is admissible (17).* Foreign instruments and records, properly authenticated, may be admitted (740). *But foreign records are evidence only if kept in pursuance of a law of such jurisdiction (18). Marriage certificates made by the officiant are admissible only if officially kept, only if the parties are identified as those named (19), and only if the officiant is properly designated, at least if his informal designation is not explained (18).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (5522). *The marriage of an aunt and nephew (1) or of an uncle and niece by the whole (20) or half blood is not ipso facto void but voidable only (21) during the lifetime of the parties (20).* *Penalty.* Any person having carnal intercourse within the degrees of relationship [as provided in 5522] shall be punished by fine of not less than $500, imprisonment of not less than one year, or both (Crim. L. 381).

b. Proper Civil and Racial Status.—The marriage of a white person with a Negro or person having one-eighth or more Negro blood shall be unlawful and void (Const. Art. III, §33). Marriage between a white person and an Indian, Negro, mulatto, mestizo, or half-breed is unlawful and utterly null and void (5536; Crim. L. 378). *Penalty.* Any person violating these provisions shall be punished by fine of not less than $500, imprisonment for not less than twelve months, or both (Crim. L. 378). [As to penalty for solemnizing such miscegenetic marriages, see 378 under 2g.] *Prior to 1879 interracial marriages were not illegal (22). Since that time the marriages of white persons and Negroes have been recognized in collateral proceedings as criminal (23) and void (24).*

c. Proper Legal Status.—All marriages contracted while either party has a spouse living shall be null and void unless such spouse shall have been absent for seven years, the one not knowing the other to be living during that time, or unless there has been a divorce or declaration of nullity (5533). *In absence of a divorce statute, nothing less than actual or presumed death can discharge the legal obligations of marriage in this state (25). A marriage contracted after a decree of limited divorce in another state, not absolute, is void and confers no property rights (26).* *Penalty.* Unless the spouse has been continually absent for seven years together, without being known to the other to be alive within that time, or is under sentence of imprisonment for life, or unless the marriage was contracted before the age of consent, or has been annulled, a person who shall marry another during the life of the former spouse shall be punished by imprisonment of from six months to five years and by fine not less than $500 (Crim. L. 374). *Though a prior marriage is necessary to support a bigamy prosecution (2), the prior marriage may be voidable so long as it is not void at the time of the bigamous marriage (1, 2, 21). Under the common law when a married person is seven years absent and not known to the spouse to be living, the spouse may marry a second time (27). Absence itself does not create the presumption of death (28): the*

absentee is presumed to be living until he has not been heard from for seven years (29), not having been known within that period to be living (28). The validity of the later marriage, of course, depends upon whether the absent spouse was in fact alive at the time of such marriage (16). A subsequent marriage may be presumed valid though contracted before the expiration of the seven year period if many years have since elapsed and the absentee has not since been heard from (30, 31). The presumption of the validity of a later marriage is based upon a presumption of a dissolution of the earlier but not upon a presumption that the earlier marriage, solemnized in due form, was illegal (32).

d. Proper Consent of Parties.—A marriage contract, unless consummated by cohabitation, may be declared void for want of consent of either party or for other cause showing the supposed contract not to have been a contract (5532). *Annulment is allowed for fraud only when it goes to the essentials of the marriage relation and not for mere false representations as to character or social standing (33). Failure to disclose a former marriage relationship is not fraud if one was competent at the time to contract marriage (16). A marriage procured by duress and never consummated is subject to annulment (18). But a marriage contracted under the statutory provision allowing a defendant to escape prosecution for seduction by marrying the victim* [see 7] *is not void on account of duress (34). It is to be noted that consummation is immaterial if the marriage is void ab initio and not only voidable (16).*

5. STATE SUPERVISION

No provision.

6. INTERSTATE RELATIONS

No statutory provision.

7. SEX OFFENSES AND MARRIAGE

Marriage of the defendant with the female seduced stays all further proceedings in a prosecution for seduction (Crim. L. 382). *But a mere unaccepted offer of marriage is no defense to the prosecution (35).*

SOUTH CAROLINA CASES

1. State v. Barefoot, 2 Rich. 209 (1845). **2.** State v. Sellers, 134 S.E. 873 (1926). **3.** Foster v. Means, 1 Sp. Eq. 569 (1844). **4.** Clement v. Mattison, 3 Rich. 93 (1846). **5.** Keys v. Norris, 6 Rich.

Eq. 388 (1854). **6.** Ex parte Glen, 4 De S. 546 (1816). **7.** Watson v. Blaylock, 2 Mill 351 (1818). **8.** Fryer v. Fryer, Rich. Eq. Cas. 85 (1832). **9.** Stringfellow v. Scott (1833), noted Rich. Eq. Cas. 109. **10.** Jewell v. Magwood (1833), noted Rich. Eq. Cas. 113. **11.** Rutledge v. Tunno, 69 S.C. 400 (1904). **12.** Tedder v. Tedder, 108 S.C. 271 (1917). **13.** Jewell v. Jewell, 1 How. (U.S.) 219 (1843). **14.** Note under Vaignuer v. Kirk, 2 De S. 640 (1808). **15.** North v. Valk, Dud. Eq. 212 (1838). **16.** Davis v. Whitlock, 90 S.C. 233 (1911). **17.** State v. Rogers, 112 S.C. 466 (1919). **18.** Miller v. Miller, 43 S.C. 306 (1894). **19.** Frederick v. Culler, 118 S.C. 102 (1921). **20.** Bowers v. Bowers, 10 Rich. Eq. 551 (1858).

21. State v. Smith, 101 S.C. 293 (1915). **22.** Kennington v. Catoe, 68 S.C. 470 (1903). **23.** Flood v. News and Courier Co., 71 S.C. 112, 118 (1905). **24.** Tucker v. Blease, 97 S.C. 303 (1913). **25.** McCarty v. McCarty, 2 Strob. 6 (1847). **26.** Young v. Naylor, 1 Hill Eq. 383 (1833). **27.** Woods v. Adm'rs. of Woods, 2 Bay 476 (1802). **28.** Boyce v. Owens, 1 Hill *8 (1833). **29.** Proctor v. M'Call, 2 Bail. 298 (1831). **30.** Chapman v. Cooper, 5 Rich. 452 (1852). **31.** Canady v. George, 6 Rich. Eq. 103 (1853). **32.** Hallums v. Hallums, 74 S.C. 407 (1905). **33.** Jakar v. Jakar, 113 S.C. 295 (1920). **34.** State v. English, 101 S.C. 304 (1915). **35.** State v. Whitaker, 103 S.C. 210 (1916).

SOUTH DAKOTA

REFERENCES: South Dakota Revised Code (two volumes), 1919; Session Laws of South Dakota, 1918 (special)—1919, 1919 (first special)—1920 (second special)—1921, 1923, 1925, 1927; Reports through Volume 48.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Revised Code and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this South Dakota section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Previous to any marriage a license for that purpose must be obtained (114). Non-compliance with the provisions of this article concerning the marriage contract does not invalidate any lawful marriage (113). *The provision for license is directory only (1).*

b. Issuer.—License is obtained from the clerk of courts of the county wherein the marriage is to be solemnized (114).

c. Compensation of Issuer.—For issuing marriage license and recording return the clerk of courts shall collect from the applicant $1.25 (6024, as amended S.L. 1927, ch. 90), which fees the clerk shall pay monthly into the county treasury (5823, as amended S.L. 1919, ch. 145), the clerk receiving as full compensation an annual salary fixed by the population of the several counties (5819, as amended S.L. 1919, ch. 148; 5822). *Penalty.* Any clerk neglecting to pay over the fees to the county treasurer with intent to evade the requirement is guilty of a misdemeanor (5923, as amended S.L. 1919, ch. 145), punishable by imprisonment not exceeding one year, fine not exceeding $500, or both (3581).

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—Any unmarried male of eighteen or female of fifteen years or upwards is capable of consenting to and consummating marriage (104). License must never be granted where either party is under the age necessary to render the marriage absolutely valid (115). *Penalty.* See 119 under 1k. A marriage contracted by a person under the age of legal consent, without the consent of the parent or guardian, may be annulled unless there was free cohabitation as husband or wife after attaining such age (131).

g. Parental Consent.—License must never be granted where either party is a minor—a male under twenty-one or a female under eighteen years (76)—without the previous consent of the parent or guardian (115), filed in the clerk's office after being acknowledged by the parent or guardian or proved to be genuine and a memorandum thereof entered (118). *Penalty.* See 119 under 1k. [As to penalty for solemnizing such marriage, see 131 under 2g. As to annulment in absence of parental consent, see 131 under 1f.] Note: Every person taking any female under fifteen years from her parent or guardian without his or her consent for the purpose of marriage is punishable by imprisonment not exceeding twenty years (4102, as amended S.L. 1921, ch. 1).]

h. Mental and Physical Qualifications.—License must never be granted where the condition of either party is such as to disqualify him from making any other civil contract (115). [Note: Other statutory provisions in relation to contracts and the capacity of parties to enter into them have no application to the contract of marriage (111).] *Penalty.* See 119 under 1k. [As to penalty for solemnizing the marriage of a person of unsound mind, see 131 under 2g.] A marriage may be annulled if at the time thereof either party was of unsound mind, unless there was free cohabitation as husband or wife after coming to reason (131).

i. Form of License.—The license shows the names and residences of the parties, affirms the non-existence of any legal impediment to the marriage, and has attached two certificates, one to be given by the officiant to the parties and the other, containing a record for filing by the clerk of courts, to be returned, under penalty, signed by the officiant, the parties, and the witnesses (114).

j. Record of License.—The clerk must cause due entry of the application for the issuing of the license to be made in a book, stating that he was acquainted with the parties and knew them to be of competent age and condition, or that the requisite proof of such

fact was made to him by one or more witnesses, stating their names, which book shall be a record of his office (117) and shall contain also a memorandum of parental consent and proof of its genuineness (118). *Penalty.* See 119 under 1k.

k. Other Provisions.—Unless the clerk is acquainted with the age and condition of the parties, he must take the testimony of competent and disinterested witnesses (116). [See 117 under 1j.] No license shall be issued intended to authorize any marriage prohibited by the section concerning miscegenetic marriages (129). [See 128 under 4b.] *Penalties.* Violation of §129 is a misdemeanor (129). [As to punishment for misdemeanor, see 3581 hereinafter.] If the clerk of courts grants a license contrary to the provisions of the preceding sections he is guilty of a misdemeanor (119), punishable by imprisonment not exceeding one year, fine not exceeding $500, or both (3581).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by a judge of the supreme, circuit, municipal, or county court, justice of the peace, or mayor, by a minister or priest of any denomination, among Indians by the peacemakers, their agents, or superintendent of Indian affairs (113), and among persons belonging to a sect dispensing with the services of a minister, according to their custom (126).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—The officiant shall examine the license (122). *Penalty.* If a marriage is solemnized without a license being procured the parties so married and all persons aiding are guilty of a misdemeanor (119), punishable by imprisonment not exceeding one year, fine not exceeding $500, or both (3581). *The criminal liability does not affect the validity of a marriage without license (1).*

d. Form of Ceremony.—The certificate of marriage must certify that the marriage was performed in accordance with the laws of the state in the presence of the persons who have subscribed their names thereto (114). [As to number of witnesses, see 121 and 122 under 2g and 3a.] Persons may be married in accordance with the custom of any sect to which they belong which dispenses with the services of any minister or magistrate (126). *For a marriage according to Indian custom to be valid, as was formerly authorized by statute, the parties must display in words in the present tense a purpose to establish the relation of husband and wife and must cohabit as such (2).*

e. Common Law Marriage.—Though marriage must be solemnized, authenticated, and recorded as provided, non-compliance with these provisions does not invalidate any lawful marriage (113). *Restrictions on marriage are directory only* (*1*). Consent alone will not constitute marriage; it must be followed by a solemnization or by a mutual assumption of marital rights, duties, or obligations (102). *A common law agreement is not enough in this state without conduct and reputation as husband and wife* (*1*), *and the parties must believe themselves in fact and in law to be married* (*3*). The consent must be to a marriage commencing instantly and not to an agreement to marry afterwards (105). *Marriage* per verba de futuro *is not recognized under our statute* (*1*, *3*). Persons married without solemnization must jointly make a written declaration of marriage showing their names, ages, and residences, the fact and time of marriage and its lack of solemnization, which declaration must be subscribed by the parties and attested by at least three witnesses and acknowledged and recorded like a grant of real property (120).

f. Irregular Solemnization.—No provision.

g. Other Provisions.—The officiant must ascertain to his satisfaction the identity of the parties and sufficiency of their ages, the name and residence of each and of the witness, or of two witnesses if more than one is present (121). No miscegenetic marriage, either with or without license, shall be solemnized (129). [See 128 under 4b.] *Penalties.* Violation of §129 is a misdemeanor (129). [As to punishment for misdemeanor, see 3581 hereinafter.] Every officiant solemnizing a marriage where to his knowledge either party is under the age of legal consent, and consent of parents or guardian is lacking, or is of unsound mind, or a marriage to which any legal impediment exists, is guilty of a misdemeanor (131; 4144), punishable by imprisonment not exceeding one year, fine not exceeding $500, or both (3581).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant must furnish to either party on request a certificate of marriage (124) and must enter the facts ascertained by him and the date of solemnization in a book kept for that purpose, and after examining the license and performing the ceremony shall deliver the license, with the certificate attached, to the persons married, and shall make return to the issuer within thirty days upon the blank properly signed by him in the presence of two witnesses and containing all the information therein called for

(122). Persons married in accordance with the custom of any sect dispensing with the services of an officiant are themselves required to make return of the marriage within thirty days thereafter to the clerk of courts (126). *Penalties.* Any officiant—or the husband where the marriage was solemnized without officiant (126)—failing to make return of the marriage to the issuer in the manner and time provided shall be fined not exceeding $50 (123).

b. Local Record.—The clerk of courts shall keep a register in which he shall record alphabetically the names and residence of the parties, the time and place of marriage, the name and title of the officiant, and the names of the witnesses present (127). The declaration of marriage [see 2e] may be filed with the clerk of courts where the parties reside, who shall record it (125). If no record of a marriage heretofore contracted be known to exist, the parties may join in a declaration of marriage which must be acknowledged and recorded like a grant of real property (120). *Penalty.* Wilful omission to perform a duty enjoined by law upon any public officer is a misdemeanor (3806), punishable by imprisonment not exceeding one year, fine not exceeding $500, or both (3581).

c. State Record.—The clerk of courts shall transmit monthly a record of the marriages performed in his county to the Director of Vital Statistics (9905, as amended S.L. 1920, ch. 92), who shall number, index, and preserve the same and biennially report to the Governor a complete summary of the information received, which report shall be published (9906, as amended S.L. 1920, ch. 92), and shall preserve all records of vital statistics heretofore collected and compiled (S.L. 1920, ch. 92, §10). *Penalty.* Any clerk of courts or other person failing to perform his duty as required by this article on Vital Statistics and by the rules of the State Board of Health is guilty of a misdemeanor (9909, as amended S.L. 1920, ch. 92), punishable by imprisonment not exceeding one year, fine not exceeding $500, or both (3581).

d. Evidence.—The entry of the marriage in the register by the clerk of courts, or a certified copy thereof, shall be competent evidence of such marriage and of the facts therein contained (127). A certified copy of a record in the office of the Director of Vital Statistics shall be prima facie evidence (S.L. 1920, ch. 92, §9). Consent to and consummation of marriage may be manifested in any form (103). *The original certificate of marriage as well as the record or copy thereof is admissible in an adultery prosecution as part of the* res gestae *(4). A certified copy of a certificate of marriage in another*

state, plus evidence of cohabitation as husband and wife, establishes the fact of marriage (5).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Marriages within the prohibited degrees are incestuous and void from the beginning (106), and the marriage of a step-parent with a stepchild is illegal and void (107). *Penalty.* Persons intermarrying within the degrees of consanguinity within which marriages are declared incestuous and void are punishable by imprisonment not exceeding ten years (3864). [The marriage of step-parents and step-children not being consanguineous, is not punishable as incest, and there is seemingly no penalty for fornication or cohabitation of unmarried persons in South Dakota.—G.M.] *Marriage of cousins, though void if contracted in South Dakota, is not so unchristian as to be considered void here if validly contracted elsewhere (6).*

b. Proper Civil and Racial Status.—The intermarriage of any person of the African, Corean, Malayan, or Mongolian race with any person belonging to the Caucasian race is prohibited (128), and is null and void from the beginning (130). *Penalty.* Any person entering into such marriage shall be punished by fine not exceeding $1000, imprisonment not exceeding ten years, or both (128). [As to penalty for license issuance and solemnization of such marriages, see 129 under 1k and 2g.]

c. Proper Legal Status.—A subsequent marriage contracted by any person during the life of a former spouse is illegal and void from the beginning unless the former marriage has been annulled or dissolved, or the former spouse has been absent and not known to such person to be living for the five preceding years or was generally reputed and believed by him to be dead, in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent court (108). *The subsequent marriage after proper absence of the former spouse is not void but voidable if contracted in good faith (7).* Every person who, having been married to one who remains living, marries any other person is guilty of bigamy (3860), unless there obtains an exception noted in §108 or unless the spouse has been sentenced to imprisonment for life (3861), and is punishable by imprisonment not exceeding five years (3862).

When a divorce is granted for adultery the guilty party cannot marry any person other than the innocent party until the death of the other (153).

d. Proper Consent of Parties.—Marriage is a personal relation arising out of a civil contract to which the consent of parties capable of contracting is necessary (102). If the consent of either party be obtained by fraud or force, the marriage is voidable (107) and may be annulled unless there was later free cohabitation (131). [See 115 under 1h.] *Penalty.* Every person taking a woman against her will and compelling her marriage to him or any other person is punishable by imprisonment of not less than ten years (4099). [Note: Taking a woman with intent to compel marriage is punishable by imprisonment not exceeding ten years (4100).]

5. STATE SUPERVISION

The State Board of Health, of which the superintendent shall be designated as Director of Vital Statistics and shall be the administrating officer, shall have general supervision of the registration of marriages and may make and enforce rules necessary for effecting such registration (S.L. 1920, ch. 92, §1) and shall furnish to persons required to make reports suitable books and blank forms in which to keep records of marriages (9898, as amended S.L. 1920, ch. 92). The state's attorney shall prosecute violations of this article upon complaint of the superintendent of vital statistics (9910). *Penalty.* See 9909 under 3c.

6. INTERSTATE RELATIONS

Marriages valid where contracted are valid in this state (112). *Though marriages contrary to the general Christian concept regarding incest need not be recognized even if valid where contracted. this exception does not include marriages of first cousins validly contracted elsewhere (6).*

7. SEX OFFENSES AND MARRIAGE

The subsequent marriage of the parties is a defense to a prosecution for seduction under promise of marriage (4104).

SOUTH DAKOTA CASES

1. Svendsen v. Svendsen, 37 S.D. 353 (1916). **2.** Henry v. Taylor, 16 S.D. 424 (1903). **3.** Bracken v. Bracken, 45 S.D. 430 (1922). **4.** State v. Walsh, 25 S.D. 30 (1910). **5.** Paul v. Paul, 41 S.D. 383 (1919). **6.** Garcia v. Garcia, 25 S.D. 645 (1910). **7.** Bardin v. Bardin, 4 S.D. 305 (1893).

TENNESSEE

REFERENCES: Annotated Code of Tennessee (five volumes), 1917–1918; Supplement, 1926; Constitution, 1916; Public Acts of Tennessee, 1927; Reports through Volume 153 Tennessee and 1 Appeals.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Code unless the Supplement is specifically cited. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Tennessee section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Before being joined in marriage the parties shall produce to the minister or officer a license (4191). *A marriage without a license is invalid (1).*

b. Issuer.—License is issued by the clerk of the county court where the female resides or where the marriage is solemnized (4191).

c. Compensation of Issuer.—For marriage bond, license, and registration, clerks of the county court are entitled to receive $1.00 (6400), of which they are deprived because of salaries which they receive in lieu of all other compensation (Sup. 6428a38).

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—No statutory provision. *The common law ages of consent remain unchanged: males of fourteen and females of twelve years are competent to marry (2, 3, 4, 5). Persons marrying under the age of consent may disagree and declare the marriage void without court decree, but if after attaining such age they agree to continue together they need not be married again (2, 4, 6 dictum). Though the marriage of persons of the age of consent, once consummated, cannot be annulled, a mere executory contract to marry may be avoided solely for the minority of the party promising (3).*

g. Parental Consent.—No county court clerk or deputy shall issue a license for the marriage of any persons either of whom shall be under eighteen years at the time without written permission therefor signed by the father of such party if living, if not, by the mother, or if both be dead then by the guardian (4192a1 and Sup.). *A statutory requirement of parental consent for license issuance being directory only, the marriage of persons of the age of consent without parental consent is valid (2), neither void nor voidable (5). Penalties.* Any clerk or deputy knowingly violating §4192a1 (4192a2) or any person knowingly signing or using any false document purporting to be the permission in §4192a1 shall be guilty of a misdemeanor (4192a3). *The penalty for issuance of a marriage license to a person of the age of consent without parental consent is purely criminal, and the parent has no civil action for wrongful issuance (5).*

h. Mental and Physical Qualifications.—No statutory provision as specific condition to license issuance. [But see 4195 and 4197 under 1k in connection with the following court decision.] *A person of unsound mind being incapable of consent, an essential element of all contracts, a marriage may be annulled for lack of the regular use of understanding sufficient to deal with discretion in the ordinary affairs of life or for mental weakness amounting to derangement (7). A lunatic upon regaining reason may affirm the marriage celebrated during insanity without a new solemnization (7).* It is ground for divorce that the woman at the time of marriage was pregnant by another person without knowledge of her husband (4201).

i. Form of License.—The license is directed to the officiant, authorizes a marriage between the parties (4191), and has appended thereto the form of the return (5888).

j. Record of License.—It is the duty of the clerk of the county court to register in a book the names of the parties and the date of license issuance (5888), and to preserve the certificate of parental consent (4192a1). *Penalty.* Failure of a public officer to keep a record book as required by law and properly to index it subjects the officer to a civil penalty by the party injured by his failure and is a misdemeanor (5854).

k. Other Provisions.—Unless the clerk knows that one of the parties is incapable of marriage, he may issue the license to anyone applying, first taking bond to the state with sufficient surety in the sum of $1250, conditioned that there is no lawful cause to obstruct the marriage, for which penalty any person aggrieved by the mar-

riage may sue (4192). *"Lawful cause to obstruct the marriage" means such cause as would render the marriage void ab initio because one of the parties was under a civil disability created by law (2, 4). Only the person aggrieved may sue: in case of a prior marriage of one party only the other party and not a parent (2). Where the breach complained of is the grieved person's own disability to contract, it is doubtful whether action can be maintained on the bond (4). Penalty.* A clerk knowingly granting license for the marriage of persons incapable thereof shall forfeit $500 to the person suing (4195). The party violating these provisions shall be guilty of a misdemeanor (4197). *This general penalty for license issuance to incapable persons does not apply to issuance to persons of the age of consent for want of parental consent (5).*

2. SOLEMNIZATION

a. Officiant.—All regular ministers of every denomination and Jewish rabbis, and all justices of the peace, judges, and chancellors, the Governor, speaker of the senate and of the house of representatives, in the state, may solemnize the rite of matrimony (4189). As to judges and chancellors, similarly (5753). [Note: The jurisdiction of justices of the peace is geographically coextensive with the limits of their respective counties (5925). *A justice acting outside his own county has no more authority to solemnize marriage than has a private citizen (1).*]

b. Officiant's Credentials.—No provision.

c. Presentation of License.—Before being joined in marriage the parties shall produce to the officiant a license authorizing the solemnization (4191).

d. Form of Ceremony.—No formula need be observed in solemnization except that the parties shall respectively declare in the presence of the officiant that they accept each other as husband and wife (4190). *A marriage of tribal Indians within tribal jurisdiction according to Indian custom is valid (8).*

e. Common Law Marriage.—No statutory provision. *A marriage, though good at common law, is not valid in this state according to statute without a license or publication of banns and without a solemnization by an authorized officiant (1); the statutory requirements are mandatory and abrogate the common law as to marriages (9, 10, 11, 12). The few decisions holding common law marriages to be valid concern mainly the marriages of slaves (13, 14, 15). Though a ceremonial marriage is*

originally void for want of compliance with a statutory requirement, long cohabitation, acknowledgment, and reputation as husband and wife raise a conclusive presumption of a subsequent legal marriage and estop a party thereto—or his personal representative (10)—from denying the validity of the marriage in order to defeat liabilities arising therefrom (12, 16). But cohabitation and repute are to be considered as mere evidence of an actual marriage (17) and no estoppel arises where the union was meretricious, where the claimant did not act in good faith and an honest belief in the validity of the marriage (11).

f. Irregular Solemnization.—No provision.

g. Other Provisions.—*Penalties.* Any officiant knowingly joining in marriage any two persons not capable thereof shall forfeit $500 to the person suing (4196). The person violating this provision shall be guilty of a misdemeanor (4197).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant shall endorse on or append to the license the date of marriage and his signature and shall return the license to the clerk of the county court within thirty days from the date of marriage (4193). It is the duty of the justice of the peace to return all licenses under which he has solemnized a marriage to the office of the clerk of the county court within six months (5938). [§5938 was enacted in 1815, since which time §4193 has been amended.—G.M.] *Penalty.* Every person failing to make such return shall be fined from $10 to $50 (4193).

b. Local Record.—The clerk of the county court shall copy immediately, under or opposite the record of license, the return of the officiant with the date of marriage and shall file the license and return in his office (5888). *Penalty.* See 5854 under 1j.

c. State Record.—No provision.

d. Evidence.—Duly certified copies of all records belonging to any public office or filed there by authority of law are evidence in all cases (5573). *The certified copy of a marriage license and certificate, though sufficient evidence of marriage, is not conclusive but may be rebutted by proof that the originals were forgeries (18). A statement of age made in an application for marriage license, as shown by the record of the license issuer, is almost conclusive of the fact of age in a collateral proceeding (19).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (4185, 6757, 6758). *The relationship of brother-sister, uncle-niece, or aunt-nephew includes those of the half as well as of the whole blood (20). The relationship between a man and his wife's sister ceases with the death of the wife (21). Penalty.* Whoever shall commit any offense mentioned in the preceding sections shall be imprisoned from five to twenty-five years (6759).

b. Proper Civil and Racial Status.—The intermarriage of white persons with Negroes or descendants of Negroes to the third generation inclusive, or their living together as man and wife, is prohibited (Const. Art. XI, §14; 4186). *Penalty.* Persons knowingly violating the last section shall be imprisoned from one to five years, and the court may substitute a fine and confinement in the county jail (4187). *An interracial marriage is socially deleterious; the interdiction is not violative of the federal Constitution or the Civil Rights Bill (22). Such marriage as is prohibited by statute is void ab initio if contracted in this state (23), and cohabitation thereunder will be criminal here even though the marriage was valid where contracted (24).*

c. Proper Legal Status.—A second marriage cannot be contracted before a dissolution of the first, but the first shall be regarded for this purpose as dissolved if either party has been absent five years and is not known to the other to be living (4188). *An earlier subsisting marriage is a civil impediment to a later marriage (2); the later marriage is void (25, 26) and does not support a prosecution for bigamy upon contracting a third marriage (26).* It is ground for divorce if either party knowingly entered a second marriage in violation of a previous marriage still subsisting (4201). *This statute is intended for the relief of one who innocently entered the apparent second marriage rather than for the protection of the other spouse to the existing marriage, the latter being adequately protected by the provision making adultery a ground for divorce (27). [But does the later supposed spouse need such remedy when the apparent marriage is ipso facto void? See note under §4201 in Code.—G.M.]* Any person, being married, who shall marry another during the life of the former spouse or shall continue to cohabit with such second spouse in this state, shall be imprisoned from two to twenty-one years (6760), unless the spouse shall continually remain beyond the limits of the United States or absent himself, without the knowledge by the party remarrying that he is living, for five years together, or unless the party marrying again has good reason to believe the other dead (6761). *For a prosecution for bigamy the prior marriage must not be void (1), and the spouse thereby must be*

proved living at the time of the subsequent marriage (28). Where a person has been absent for but four and one-half years, a contract by the spouse to marry another after the five years have elapsed is void as against public policy (29). [Note: It is unlawful to teach the doctrine of polygamy or to induce its embracement or emigration for that purpose (6765). *Penalty.* Violation is punishable by fine not exceeding $500, imprisonment not exceeding two years, or both (6766).] If one party marries again upon a false rumor, apparently well founded, of the death of the other, who has been absent two whole years, the party remaining single may insist within one year after returning upon the restoration of conjugal rights or upon a dissolution of his marriage, and the court shall decree accordingly (4214).

A defendant in a divorce action who has been guilty of adultery shall not marry the person with whom the crime was committed during the life of the former spouse (4228). *Any such marriage of the guilty party with the paramour is void (30, 31, 32).* [*See* 6.]

d. Proper Consent of Parties.—*The fraud warranting annulment must be such as operates upon one of the immediate parties to the contract, vitiating the contract between them; fraudulent motives as to third persons are immaterial (33). And as between the parties mere misrepresentation as to station, property, et cetera—a secret intention to secure pecuniary benefit and then desert—is no ground for annulment (34). Actual duress precluding consent, the essence of any contract, avoids a marriage (35). Penalties.* Any person taking a female and compelling her to marry him or any other person—or intending to compel her marriage (6461)—shall be imprisoned from ten to twenty-one years (6460). *A marriage invalid when contracted may be ratified without a new solemnization by such conduct as amounts to recognition of its validity (7).*

5. STATE SUPERVISION

No provision.

6. INTERSTATE RELATIONS

No statutory provision. *A marriage valid where contracted is generally said to be valid everywhere (8, 31), even if such foreign jurisdiction is an Indian tribe inhabiting lands within this state (8). But the rule applies only to the manner and form of marriage, not the capacity of the parties to contract (24), and has two exceptions: marriages contrary to the law of nature as recognized in Christendom and marriages*

which the local law-making body has declared shall have no validity (31). Where citizens of this state withdraw temporarily to another state and there marry to avoid our statute (prohibiting marriage of a divorced person with his accomplice in adultery [see 4c]), expressive of the public policy of our state, upon return to this state the parties will not be recognized as married (31), possibly even if they did not contract the marriage elsewhere with intent to evade our law (32). The statute of another state prohibiting remarriage after a divorce in that state, being penal in nature, has no extraterritorial effect upon a later marriage contracted in this state (36), nor does it make the person remarrying guilty of bigamy (37).

TENNESSEE CASES

1. Bashaw v. State, 1 Yer. 177 (1829). **2.** Governor v. Rector, 10 Hum. 57 (1849). **3.** Warwick v. Cooper, 5 Sneed 659 (1858). **4.** Jordan v. Manning, 2 Higgins 130 (1911). **5.** Drake v. Currier, 4 Higgins 353 (1913). **6.** McReynolds v. State, 5 Cold. 18 (1867). **7.** Cole v. Cole, 5 Sneed 57 (1857). **8.** Morgan v. McGhee, 5 Hum. 13 (1844). **9.** Grisham and Ligan v. State, 2 Yer. 589 (1831). **10.** Smith v. North Memphis Savings Bank, 115 T. 12 (1905). **11.** Horn v. Shelton, 6 Higgins 530 (1916). **12.** Bohlen-Huse Coal and Ice Co. v. McDaniel, 148 T. 628 (1923). **13.** McCorry v. King's Heirs, 3 Hum. 267, 273 (1842). **14.** Andrews v. Page, 3 Heisk. 653 (1871). **15.** Stothart v. Harrison, 3 Chan. 635 (1878). **16.** Johnson v. Johnson, 1 Cold. 626 (1860). **17.** Jarnigan v. Jarnigan, 12 Lea 292 (1883). **18.** Rice v. State, 7 Hum. 14 (1846). **19.** Johnson v. Steger and Sons, 7 Higgins 317 (1917). **20.** Shelly v. State, 11 Pickle 152 (1895).

21. Wilson v. State, 16 Pickle 596 (1898). **22.** Lonas v. State, 3 Heisk. 287 (1871). **23.** Carter v. Montgomery, 2 Chan. 216 (1875). **24.** State v. Bell, 7 Bax. 9 (1872). **25.** Sellars v. Davis, 4 Yer. 503 (1833). **26.** Keneval v. State, 23 Pickle 581 (1901). **27.** Moore v. Moore, 18 Pickle 148 (1899). **28.** Dunlap v. State, 126 T. 415 (1912). **29.** Johnson v. Iss, 114 T. 114 (1904). **30.** Owen v. Bracket, 7 Lea 448 (1881). **31.** Pennegar and Haney v. State, 3 Pickle 244 (1888). **32.** Newman v. Kimbrough, 59 S.W. 1061 (1900). **33.** McKinney v. Clarke, 2 Swan 321 (1852). **34.** Castellar v. Simmons, 1 Shannon 65 (1853). **35.** Willard v. Willard, 6 Bax. 297 (1873). **36.** Dickson v. Dickson's Heirs, 1 Yer. 110 (1826). **37.** Turpin v. Turpin, 58 S.W. 763 (1899).

TEXAS

REFERENCES: Revised Civil Statutes of Texas (two volumes), 1925; Revised Criminal Statutes of Texas, 1925; Vernon's Cumulative Quarterly Statute Service (including General Laws, 1927); Reports through Volume 115 Texas and 105 Criminal.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to articles of the Civil Statutes unless the Penal Code is specifically cited. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Texas section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Persons who desire to marry shall procure a license (4604). *A license is not an absolute requisite to the validity of a marriage contracted in this state (1, 2, 3, 4, 5, 6).* [*See* 2e.]

b. Issuer.—License is obtained from the county clerk (4604). [Note: The terms "county clerk" and "clerk of the county court" seem to be used interchangeably in the statutes (1940).] *License may be issued in any county (7), and a marriage in one county under a license issued in another is legal and binding (8). Mistake of the issuer in signing a license as district clerk rather than as county clerk, both of which offices he holds, does not affect the validity of the marriage (9).*

c. Compensation of Issuer.—The clerk receives $1.00 for issuing and recording the license (3930). Of the total fees collected the clerk pays into the county treasury sums in excess of the salaries of deputies (3891) plus a maximum compensation varying according to the size of the counties (3883) plus a maximum excess compensation varying by counties (3891).

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—[No statutory provision as condition to license issuance.] Males under sixteen and females under fourteen years

shall not marry (4603). *This statute providing that persons under sixteen and fourteen shall not marry expressly inhibits any sort of marriage below such ages, and any attempt to contract a marriage with a girl under such age is no defense to a charge of rape (10, 11, 12). But the marriage of a female of fourteen years is valid (13, 14) and not subject to annulment for nonage (15).*

g. Parental Consent.—No clerk shall issue a license to males under twenty-one or females under eighteen years without the consent of the parent or guardian, given in person or in writing signed and acknowledged before an authorized officer, or if the minor has no parent or guardian, then the consent of the county judge of the county of the minor's residence, in writing signed and acknowledged. If in doubt the clerk shall require a sworn certificate from the parent or guardian or some person other than the contracting parties that the parties are of age. This section shall not affect the issuance of marriage licenses in seduction prosecutions (4605). If both parents are alive the consent of the father alone suffices (Pen. C. 405). *Generally provisions regulating the mode of entry into marriage, such as requirements for parental consent, are directory only and do not invalidate a marriage entered into in violation thereof (16). Though it has been said that a girl under eighteen has no right to marry unless a license has been procured with parental consent (17), in absence of a statute declaring void such marriages, the marriage without parental consent of a girl under eighteen but over the age of consent is valid regardless of wrongful issuance of license (13, 18). And though the marriage of a girl under eighteen is not subject to annulment upon suit of her parents (15), a minor female even over eighteen is not an adult and is not bound by her executory contract to marry (13).*

Penalty. For issuance of license to a minor without the consent prescribed the clerk is punishable by fine not exceeding $1000 (Pen. C. 404). [As to abduction of girl under fourteen, see Pen. C. 1180 under 4d.] *The license issuer, though not required to take an affidavit as to parental consent, is authorized to do so for his own protection (19, 20). False swearing in such affidavit is an indictable offense (20) whether the falsity concerns a party's age (21) or the giving of parental consent (22), whether the oath is taken before a clerk or his deputy (23, 24), and whether it concerns the fact immediately in issue or only a circumstance tending to prove or disprove such fact (19). Lack of notice of age or of want of parental consent is no defense to the issuer: he must affirmatively ascertain whether he is authorized by law to issue the license (25). But the marriage of a minor of the age of consent being valid, a parent cannot recover for loss of services caused by the*

minor's marriage under a license issued by the clerk without parental consent (18).

h. Mental and Physical Qualifications.—No statutory provision. *If a person is mentally so incapacitated at the time and subsequently as to be incapable of contracting marriage, a ceremony is of no effect (26). Temporary insanity depriving of capacity to enter a matrimonial agreement, though it might make the marriage voidable in a direct proceeding, does not make the marriage void and subject to collateral attack and is no defense to a prosecution for bigamy (27). Antenuptial incontinence does not warrant divorce (28) or free the other spouse from marital obligations (29). [As to misrepresentation or concealment of pregnancy constituting fraud, see* 4d.]

i. Form of License.—The license is directed to all authorized officiants (4604).

j. Record of License.—The clerk shall record all licenses issued (4606).

k. Other Provisions.—*Though the issuer has the right to inquire into the status and eligibility of the parties, granting a marriage license is a ministerial not a judicial act (23). A competent deputy has the same power in issuing licenses as the county clerk himself (24), even though he be a minor (23).*

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by all licensed or ordained ministers, Jewish rabbis, judges of the district and county courts, and justices of the peace (4602).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—The license shall be sufficient authority to celebrate a marriage (4604). *Penalty.* For solemnizing a marriage without a license first having been issued as required, an authorized officiant shall be fined from $50 to $500 (Pen. C. 406).

d. Form of Ceremony.—No statutory provision. *The marriage of a member of an Indian tribe in Indian territory is recognized here if valid according to Indian custom (30).*

e. Common Law Marriage.—No statutory provision. *In absence of a statute in this state declaring null a marriage not solemnized as pre-*

scribed, the statutory requirements are directory only, and a marriage good according to the common law is valid (2, 3, 4, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49). There was some question as to the validity of a marriage without religious sanction when Texas was governed by Spanish and Mexican law (50, 51, 52), but since Texan statehood the validity of common law marriages has hardly been doubted (17, 53 as interpreted by 39). To constitute a common law marriage there are two essentials: a mutual agreement to become husband and wife (46, 54, 55, 56)—absolute, permanent (57), and unconditional (58)—and an assumption of the matrimonial relation in fact by professed cohabitation therein (45, 59); both elements are necessary (2, 3, 31, 32, 36, 38, 44, 60, 61, 62, 63, 64). Though a contract per verba de futuro cum copula *has been said to constitute a valid marriage (37, 54), mere sexual intimacy following a promise of future marriage may not suffice (40, 65), except in so far as it shows a present intent to contract a marriage (37).*

Though mere cohabitation does not constitute a common law marriage unless in pursuance of a bona fide agreement, expressed or implied, to enter the conjugal relation (66, 67, 68), cohabitation and reputation as husband and wife may raise a presumption of marriage (6, 61, 69, 70, 71, 72). Cohabitation of persons as husband and wife means dwelling together in the same house, eating at the same table, and holding themselves out and recognizing each other as husband and wife (73, dictum). Where there is cohabitation and mutual recognition, reputation of marriage among neighbors is a mere circumstance in proof (48). But the presumption of a common law marriage does not arise from a mere secret agreement plus clandestine cohabitation (74) or from the birth of a child prior to a ceremonial marriage (58), and is rebutted by evidence of the original illicitness of the relation (64, 75), of a later ceremonial marriage with a third person (47), or of a law forbidding the parties to intermarry (76). Where property rights are based upon an alleged common law marriage, courts will scrutinize the parties' relations closely (77).

Where a marriage is invalid because of a prior, subsisting marriage, there is some question as to whether continued cohabitation and conduct as husband and wife after removal of the impediment will constitute a valid marriage (41, 75, 78). Probably the parties must know of the removal of the impediment and must mutually assent to the marital relationship thereafter (75), which assent may be shown by conduct and declarations (78) or by only slight evidence, the continued cohabitation itself being a constant offer and acceptance of the relationship where the marriage was originally contracted in good faith (79). Under Spanish law a putative marriage was converted into a real marriage by removal

of the disability (80, 81). Continued cohabitation and recognition of the marriage relation constitutes a common law marriage in Texas when the union was originally void because of conditions imposed by the law of the place where formed, as if a marriage were there valid only if duly solemnized (82), or because of the parties' status, e.g., as slaves (83). Though the law tolerates common law marriages, it does not encourage them and raises no presumption of the validity of a common law marriage as opposed to a prior ceremonial marriage of one of the parties (84).

f. Irregular Solemnization.—No statutory provision. *Common law marriages being recognized, lack of authority of the officiant is immaterial to the validity of a marriage (34), and mistake of a clerk in issuing a license is similarly immaterial to the validity of a marriage solemnly consummated (9). Under Spanish law, though the husband had a prior wife, a subsequent wife who was ignorant of the former marriage had all the rights and obligations of a lawful wife so long as that ignorance continued (80, 81, 85, 86); she had, however, to act in good faith and not merely fail from negligence to ascertain the facts (87). That doctrine still persists in Texas (85, 86) at least to the extent of entitling the putative wife to a share in the community property (88).*

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant shall indorse the license and return it to the county clerk within sixty days after the celebration (4606).

b. Local Record.—The officiant's return shall be recorded by the county clerk with the license (4606). [Note: The city council shall have power to regulate the registration of marriages (1015).]

c. State Record.—No provision.

d. Evidence.—Certified copies of the records of public officers shall be admitted as evidence in all cases where the records themselves would be admissible (3720). In prosecutions for adultery the marriage may be proved by the original or certified copy of the marriage license and return or by testimony of a person present at the marriage or who has known the husband and wife to cohabit as married persons (Pen. C. 500). *The original marriage license with the officiant's return thereon (53, 89, 90, 91, 92, 93) or a certified copy thereof from the records of the county clerk, is legal evidence of marriage (94, 95). The marriage license and record being primarily for the benefit of the parties and those claiming rights dependent upon the marriage, they do not*

constitute notice of the relation to third persons dealing with either spouse (96) and, being res inter alios acta, *are not admissible in collateral proceedings between third persons (97). Absence of a record of a marriage license in the county clerk's office at about the date of the alleged marriage does not show that no license was issued (6); absence of record in one county does not prove that a license was not issued in another (7); and absence of record in any county in the state raises no presumption where the records of some offices have been destroyed since the date of the alleged marriage (38). In absence of a statute in this state as to the admissibility of foreign records, a certified copy of a record of marriage in another state is admissible only if authenticated according to the provision of federal law (98, 99). For the record of another state to be evidence of the validity of a marriage, there must be proof of statutes of that state requiring registration of marriages and making such records evidence in its own courts (80, 100). Where the laws of another state do not require a record of license, a deposition of a clerk that the records fail to show issuance of a license on the date of the alleged marriage is inadmissible (101).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (Pen. C. 496, 497). *Relations between a man and the daughter of his half-brother or sister are within the incestuous degrees (31). Relationship by affinity continues so long as the marriage continues which created it (102) and ceases with the dissolution thereof (103, 104). Inasmuch as incest is impossible between persons whose affinitative relationship has ceased (103), before carnal intercourse between a stepfather and stepdaughter can constitute incest a legal marriage between the mother and the stepfather must be affirmatively established (105, 106, 107, 108, 109, 110, 111), at least where there is evidence of the subsistence of a prior marriage of the mother or stepfather (104, 112). Penalty.* All persons marrying within the forbidden degrees shall be imprisoned for from two to ten years (Pen. C. 495).

b. Proper Civil and Racial Status.—Intermarriage between persons of Caucasian blood or decent and persons of African blood or descent is unlawful, and such marriages shall be null and void (4607). *Penalty.* White persons and Negroes knowingly intermarrying or cohabiting shall be imprisoned from two to five years (Pen. C. 492). The term "Negro" includes persons of one-eighth or more Negro blood (Pen. C. 493). *The statute making criminal the intermarriage of white and black persons is not contrary to the federal Constitution or*

the Civil Rights Bill (89, 113). The statute legalizing the cohabitation of slaves into valid marriage applies only to parties both of whom were slaves and does not legalize relations between a white person and a Negro (114, overruling 115). Because interracial unions are unlawful no marriage is presumed from the cohabitation of a white person and a Negro (76). Inasmuch as civil death does not follow even conviction for a felony, one merely under indictment for rape may marry (116).

c. Proper Legal Status.—*The marriage of a person already married is void (1, 7, 47, 52, 59, 105, 108, 117, 118, 119, 120, 121), except as regards property rights of the innocent putative wife (85, 86, 122, 123, 124).* [*See* 2f.] A person not legally divorced who marries when a former spouse is living, except in cases where the spouse has continually remained outside the state or has voluntarily withdrawn and remained absent for five years, the person marrying not knowing the other to be living within that time, shall be imprisoned from two to five years (Pen. C. 490 and 491). *For bigamy it is essential to prove that the first marriage alleged in the indictment subsisted at the time of the second which was contracted in this state (125, 126, 127). Though the first marriage must be entirely valid to support the prosecution (128), not so the second (129), which may be contracted only according to the common law (43), not in conformity with statutory requirements (39), and with knowledge by the second woman of the first undissolved marriage (129). A remarriage in the belief that three years' absence of a spouse makes a former marriage void is no defense to an indictment for bigamy (130). Although where the first spouse was living only five months prior to the second marriage and defendant admitted having two spouses the jury may presume the first spouse to have been living at the time of the second marriage (131), the statute makes voluntary absence for a full five years without knowledge that the spouse is living an absolute defense regardless of any presumption of the continuance of life (132). The presumption of death after seven years' absence is not, however, conclusive (133).*

Neither party to a divorce for cruelty shall marry any other person for a year subsequent to such divorce; in other cases either party may marry again after dissolution of the marriage (4640). *The statute forbidding remarriage after divorce for cruelty, not declaring the later marriage void or imposing a penalty, renders the later marriage voidable only (134), but in a prosecution for bigamy the defendant may not plead in justification of the later marriage the existence of a divorce decree forbidding his remarriage for a year (135). The statute does not authorize any provision in the divorce decree prohibiting remarriage*

after divorce, and there can be no contempt proceeding for violation of such order (134). Though an interlocutory decree for divorce does not dissolve a marriage so as to allow of remarriage (136), in Texas all decrees are absolute from the time of entry unless set aside or appealed from (137).

There is a presumption in favor of the validity of a later ceremonial marriage (138)—though not of a later common law marriage (84, 139)—which overcomes the presumption of the continuance of life of a former spouse (69) and puts on the person attacking its validity the burden of proving the subsistence of an earlier marriage (140, 141, 142, 143, 144, 145). Though the validity of a marriage proved by evidence of a formal ceremony cannot be disproved by mere evidence of reputation that the parties are not married (146), the presumption of the validity of a later marriage is rebutted by evidence that no divorce was granted from a prior marriage (136).

d. Proper Consent of Parties.—*The marriage status being fixed when the contract is entered into according to law, consummation by coition is not necessary to the validity of a ceremonial marriage (16, 84). A marriage procured by force or fraud is void (16, 147). Though antenuptial chastity is not so essential to the marriage relation that misrepresentation amounts to fraud rendering the marriage voidable (28), pregnancy by another man at the time of marriage is an impediment rendering the marriage voidable (148) and subject to divorce (149, 150). The evidence must of course overcome the presumption that a child born in wedlock is begot by the husband (148). But a woman's false representation before marriage that she was pregnant by the man is not fraud allowing of annulment where the man was put on guard by knowledge of her unchastity, even though in fact she was not pregnant or was pregnant by another man (151). It has been held that it is fraud allowing of annulment to represent that a marriage under a license procured by false swearing as to age is in fact a marriage according to statutory requirements (147). [The legal basis of this decision is questionable. —G.M.] Only immediate personal constraint at the time of marriage constitutes duress warranting annulment (152). A man under arrest for seduction or rape who marries to escape prosecution may not obtain annulment for duress or freedom from marital obligations (29, 130, 153, 154), especially where the marriage is a voluntary fulfilment of the previous promise (155). Penalties.* Abduction is the false imprisonment of a woman with intent to force marriage, punishable by fine not exceeding $2,000, and forcing a woman into marriage by abduction is punishable by imprisonment of from two to five years (Pen. C.

1179, 1182). Taking a girl under fourteen years from her parent for the purpose of marriage is abduction even though she consents and though the marriage afterwards takes place (Pen. C. 1180). *Abduction of a girl under fourteen with intent to force marriage is a misdemeanor only; if marriage is effected thereby it is a felony (156). If the parties to a voidable marriage cohabit as husband and wife after the innocent party has discovered the fraud (147) or after removal of the constraint, the marriage is ratified and is no longer subject to annulment (154, 155).*

5. STATE SUPERVISION

No provision.

6. INTERSTATE RELATIONS

No statutory provision. *The statute of another state forbidding remarriage for a certain period after divorce has no extraterritorial effect upon a marriage validly contracted elsewhere (137, 138).*

7. SEX OFFENSES AND MARRIAGE

If before pleading to an indictment for seduction the defendant marries the woman, or offers marriage, the prosecution shall be dismissed (Pen. C. 506). [As to parental consent in seduction cases, see 4605 under 1g.] *Public policy favors marriage after seduction and other sex offenses (116, 157). Nothing less than actual marriage or bona fide offer of marriage is a bar to conviction for seduction (158). The statute requires only the vows of matrimony, and an offer in good faith to go through the ceremony but with the intention not to perform marital duties later affords the right of dismissal (159). But as good faith means the ability to consummate the marriage (161), a conditional offer to marry when of age, the parent now refusing consent (160, 161), or an offer which is impossible of fulfilment, the prosecutrix having married another, is no defense (162). A common law marriage between the parties is a good defense to the charge of fornication (49). In the absence of a statute to the contrary, one in jail under indictment for rape has the right to marry the injured girl (116).* Marriage shall not be a defense to the crime of pandering (Pen. C. 523). *The offense of adultery is not condoned by the subsequent intermarriage of the guilty parties (163).*

TEXAS CASES

[Note: C.A. means Court of Appeal, the name of the series known after 1892 as Criminal Reports (Crim.).]

1. Chapman v. Chapman, 11 Civ. App. 392 (1895); writ of error refused, 88 T. 641; 16 Civ. App. 382 (1897); writ of error denied, 93 T. 701. **2.** Hearne v. State, 50 Crim. 431 (1906). **3.** Knight v. State, 55 Crim. 243 (1909). **4.** Harlan v. Harlan, 125 S.W. 950 (1910). **5.** Morville v. State, 63 Crim. 553 (1911). **6.** Wiess v. Hall, 135 S.W. 384 (1911); writ of error refused, 106 T. 660. **7.** Clover v. Clover, 224 S.W. 916 (1920); 247 S.W. 300 (1922–1923). **8.** Cummings v. State, 36 Crim. 256 (1896). **9.** Foster v. State, 31 Crim. 409 (1892). **10.** Hardy v. State, 37 Crim. 55 (1897). **11.** Carson v. State, 94 Crim. 159 (1923). **12.** Perdoza v. State, 97 Crim. 621 (1924). **13.** Wells v. Hardy, 21 Civ. App. 454 (1899); writ of error refused, 93 T. 697. **14.** Murphy v. State, 65 Crim. 55 (1912). **15.** Ex parte Nolte, 269 S.W. 906 (1925). **16.** Thompson v. Thompson, 202 S.W. 175 (1918); judgment modified, 203 S.W. 939. **17.** Western Union Tel. Co. v. Procter, 6 Civ. App. 300 (1894). **18.** Jackson v. Banister, 47 Civ. App. 317 (1907). **19.** Davidson v. State, 22 C.A. 372 (1886). **20.** Steber v. State, 23 C.A. 176 (1887).

21. Smith v. State, 37 Crim. 488 (1896). **22.** Adams v. State, 49 Crim. 361 (1906). **23.** Harkreader v. State, 35 Crim. 243 (1895). **24.** Mahon v. State, 46 Crim. 234 (1904). **25.** Evans v. Johnson, 61 S.W. 143 (1901). **26.** Holland v. Riggs, 53 Civ. App. 367 (1909); writ of error refused, 104 T. 694. **27.** Hooter v. State, 88 Crim. 265 (1920). **28.** Griggs v. Griggs, 61 S.W. 941 (1901). **29.** Huntley v. State, 98 Crim. 530 (1924). **30.** First National Bank v. Sharpe, 12 Civ. App. 223 (1896); writ of error denied, 93 T. 683. **31.** Simon v. State, 31 Crim. 186 (1892). **32.** Cumby v. Henderson, 6 Civ. App. 519 (1894); writ of error refused, 93 T. 638. **33.** Ingersol v. McWillie, 9 C.A. 543 (1895); writ refused, 87 T. 647. **34.** Holder v. State, 35 Crim. 19 (1895). **35.** Coleman v. Vollmer, 31 S.W. 413 (1895). **36.** Schwarz v. Allen, 37 S.W. 986 (1896). **37.** Simmons v. Simmons, 39 S.W. 639 (1897). **38.** Galveston, etc. Ry. Co. v. Cody, 20 Civ. App. 520 (1899); writ of error refused, 92 T. 632. **39.** Waldrop v. State, 41 Crim. 194 (1899). **40.** Cuneo v. De Cuneo, 24 Civ. App. 436 (1900).

41. Bull v. Bull, 29 Civ. App. 364 (1902). **42.** Burnett v. Burnett, 83 S.W. 238 (1904). **43.** Burks v. State, 50 Crim. 47 (1906). **44.**

Berger v. Kirby, 135 S.W. 1122 (1911); affirmed, 105 T. 611 (1913). **45.** Grigsby v. Reib, 139 S.W. 1027 (1911); affirmed, 105 T. 597 (1913). **46.** Nye v. State, 77 Crim. 389 (1915). **47.** Walton v. Walton, 191 S.W. 188 (1916); 203 S.W. 133 (1918); 228 S.W. 921 (1921). **48.** Brooks v. Hancock, 256 S.W. 296 (1923). **49.** Cook v. State, 266 S.W. 1099 (1924). **50.** Sapp v. Newsom, 27 T. 537 (1864). **51.** Rice v. Rice, 31 T. 174 (1868). **52.** Lewis v. Ames, 44 T. 319 (1875). **53.** Dumas v. State, 14 C.A. 464 (1883). **54.** Bargna v. Bargna, 127 S.W. 1156 (1910). **55.** Wofford v. State, 60 Crim. 624 (1911). **56.** Edmondson v. Johnson, 207 S.W. 586 (1918); writ of error denied, 208 S.W. XVI. **57.** Schwingle v. Keifer, 135 S.W. 194 (1911); affirmed, 105 T. 609 (1913). **58.** Whitaker v. Shenault, 172 S.W. 202 (1914–1915); writ of error denied, 179 S.W. XVI. **59.** Melton v. State, 71 Crim. 130 (1913). **60.** Lee v. State, 44 Crim. 354 (1902).

61. Ahlberg v. State, 88 Crim. 173 (1920). **62.** Winters v. Duncan, 220 S.W. 219 (1920). **63.** Bobbitt v. Bobbitt, 223 S.W. 478 (1920). **64.** De Beque v. Ligon, 286 S.W. 749 (1926). **65.** Crossett v. State, 97 Crim. 18 (1924). **66.** Andrews v. Andrews, 75 T. 609 (1890). **67.** Bell v. Southern Casualty Co., 267 S.W. 531 (1924–25). **68.** Robinson v. Casey, 272 S.W. 536 (1925). **69.** Yates v. Houston, 3 T. 433 (1848). **70.** Babb v. Carroll, 21 T. 765 (1858). **71.** Houston Oil Co. v. Griggs, 181 S.W. 833 (1915); writ of error denied, 188 S.W. XVI. **72.** Reed v. State, 95 Crim. 492 (1923). **73.** Levy v. Goldsoll, 62 Civ. App. 257 (1910). **74.** James v. James, 253 S.W. 1112 (1923). **75.** U.S. Fidelity and Guaranty Co. v. Dowdle, 269 S.W. 119 (1924–25). **76.** Oldham v. McIver, 49 T. 556 (1878). **77.** Grant v. Grant, 286 S.W. 647 (1926). **78.** Edelstein v. Brown, 35 Civ. App. 625 (1904); 95 S.W. 1126 (1906); affirmed, 100 T. 403. **79.** Gorman v. Gorman, 166 S.W. 123 (1914); writ of error denied, 170 S.W. XVII. **80.** Smith v. Smith, 1 T. 621 (1846).

81. Lee v. Smith, 18 T. 141 (1856). **82.** Davis v. Jeffords-Schoenmann Produce Co., 261 S.W. 401 (1924). **83.** Wood v. Cole, 25 Civ. App. 378 (1901); writ of error refused, 94 T. 708. **84.** Lopez v. Mo. K. and T. Ry. Co., 222 S.W. 695 (1920). **85.** Barkley v. Dumke, 99 T. 150 (1905). **86.** Middleton v. Johnston, 110 S.W. 789 (1908); writ of error refused, 103 T. 667. **87.** Walker v. Walker's Estate, 136 S.W. 1145 (1911); writ of error refused, 106 T. 659. **88.** Green v. Green, 167 S.W. 263 (1914). **89.** Frasher v. State, 3 C.A. 263 (1877). **90.** Stoker v. Patton, 35 S.W. 64 (1896). **91.** McMahan v. State, 61 Crim. 489 (1911). **92.** Edwards v. State, 73 Crim. 380 (1914). **93.** Holman v. Holman, 283 S.W. 271 (1926). **94.** Bryan v.

State, 63 Crim. 200 (1911). **95.** Harris v. State, 74 Crim. 52 (1914). **96.** Steves v. Smith, 49 Civ. App. 126 (1908); writ of error refused, 103 T. 673. **97.** Chew v. State, 23 C.A. 230 (1887). **98.** Walker v. State, 64 Crim. 70 (1911). **99.** DeLucenay v. State, 68 S.W. 796 (1902). **100.** Patterson v. State, 17 C.A. 102 (1884).

101. Campbell v. McFadden, 9 Civ. App. 379 (1895). **102.** Clanton v. State, 20 C. A. 615 (1886). **103.** Johnson v. State, 20 C.A. 609 (1886). **104.** Stanford v. State, 42 Crim. 343 (1900). **105.** McGrew v. State, 13 C.A. 340 (1883). **106.** Compton v. State, 13 C.A. 271 (1882). **107.** Harville v. State, 54 Crim. 426 (1908). **108.** Burford v. State, 68 Crim. 295 (1912). **109.** Hamilton v. State, 68 Crim. 419 (1913). **110.** Vickers v. State, 69 Crim. 628 (1913); later appeal, 75 Crim. 12 (1914). **111.** Landin v. State, 101 Crim. 373 (1925). **112.** Nance v. State, 17 C.A. 385 (1885). **113.** Francois v. State, 9 C.A. 144 (1880). **114.** Clements v. Crawford, 42 T. 601 (1875). **115.** Honey v. Clark, 37 T. 686 (1872). **116.** Hedrick v. Marshall, 282 S.W. 289 (1926). **117.** Crow v. State, 72 S.W. 392 (1903). **118.** Lara v. State, 48 Crim. 568 (1905). **119.** Lee v. Bolden, 85 S.W. 1027 (1905). **120.** Young v. State, 49 Crim. 207 (1906).

121. Cunningham v. Cunningham, 210 S.W. 242 (1918–1919); writ of error refused. **122.** Morgan v. Morgan, 1 Civ. App. 315 (1892). **123.** Lawson v. Lawson, 30 Civ. App. 43 (1902); writ of error refused, 97 T. 639. **124.** Fort Worth and Rio Grande Ry. Co. v. Robertson, 103 T. 504 (1910); reprinting 121 S.W. 202. **125.** Goad v. State, 51 Crim. 393 (1907). **126.** Rogers v. State, 83 Crim. 526 (1918). **127.** Scott v. State, 29 C.A. 217 (1890). **128.** McCombs v. State, 50 Crim. 490 (1906). **129.** Bethany v. State, 91 Crim. 59 (1922). **130.** Medrano v. State, 32 Crim. 214 (1893). **131.** Gorman v. State, 23 T. 646 (1859). **132.** Poss v. State, 47 Crim. 486 (1904). **133.** Barrios v. State, 83 Crim. 548 (1918). **134.** Ex parte Castro, 115 T. 77 (1925). **135.** Biddy v. State, 96 Crim. 74 (1923). **136.** Kinney v. Tri-State Telephone Co., 201 S.W. 1180 (1918); reversed, 222 S.W. 227 (1920). **137.** Vickers v. Faubion, 224 S.W. 803 (1920). **138.** Wingo v. Rudder, 120 S.W. 1073 (1909). **139.** Dowdle v. U.S. Fidelity and Guaranty Co., 242 S.W. 771 (1922). **140.** Lockart v. White, 18 T. 102 (1856).

141. Carroll v. Carroll, 20 T. 731 (1858). **142.** Nixon v. Wichita Land and Cattle Co., 84 T. 408 (1892). **143.** Adams v. Wm. Cameron and Co., 161 S.W. 417 (1913). **144.** Tanton v. Tanton, 209 S.W. 429 (1919). **145.** Franklin v. Franklin, 247 S.W. 329 (1922). **146.** Clayton v. Haywood, 63 Civ. App. 571 (1911). **147.** Robertson

v. Cole, 12 T. 356 (1854). **148.** McCulloch v. McCulloch, 69 T. 682 (1888). **149.** Harrell v. Harrell, 42 S.W. 1040 (1897). **150.** Johnson v. Johnson, 152 S.W. 661 (1912). **151.** Young v. Young, 127 S.W. 898 (1910). **152.** Burton v. State, 51 Crim. 196 (1907). **153.** Johns v. Johns, 44 T. 40 (1875). **154.** Gass v. Gass, 182 S.W. 1195 (1916). **155.** Merrell v. Moore, 47 Civ. App. 200 (1907). **156.** DeHart v. State, 87 Crim. 21 (1920). **157.** Hanes v. Hanes, 234 S.W. 1078 (1921); reversing 216 S.W. 272; later appeal, 239 S.W. 190. **158.** Hinman v. State, 59 Crim. 29 (1910). **159.** Wright v. State, 31 C.A. 354 (1892). **160.** Merrell v. State, 42 Crim. 19 (1900). **161.** Harvey v. State, 53 S.W. 102 (1899). **162.** Thorp v. State 59, Crim. 517 (1910). **163.** Fox v. State, 3 C.A. 329 (1877).

UTAH

REFERENCES: Compiled Laws of Utah, 1917 (two volumes); Laws of Utah, 1919, 1919 (special session), 1921, 1923, 1925, 1927; Reports through Volume 66.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Compiled Laws and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Utah section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—No marriage shall be solemnized without a license therefor (2972, as amended L. 1919, ch. 61).

b. Issuer.—License is issued by the county clerk of the county in which the female resides, unless she is eighteen years or older or a widow and applies in person or in writing signed by her, in which case it may be issued by the clerk of any county (2972, as amended L. 1919, ch. 61). [Note: Any marriage consummated by virtue of a license issued by any district court or clerk thereof, prior to the approval of this section, is valid (2972, as amended L. 1919, ch. 61).]

c. Compensation of Issuer.—For issuing and recording a marriage license the county clerk collects $2.50 (2521) for the use of the county, the clerk paying such fees to the county treasury monthly (2520) and receiving a salary in full compensation for all services (5092, as amended L. 1919, ch. 97).

d. Personal Appearance by Candidates.—No provision. [See 2972 under 1b.]

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—Marriage is prohibited and declared void when the male is under sixteen or the female under fourteen years at the time of marriage (2967). [As to penalty for license issuance, see 2980 under 1k.] Upon suit of the party under age (3006), courts may declare void a marriage contracted when the male was under

sixteen or the female under fourteen years and the marriage was without consent of the parent or guardian and has not been ratified by cohabitation after that age (3007). [*It is unlikely that this phrase, though in the conjunctive, means that marriage can be contracted below the minimum ages prescribed if parental consent is given (1).—G.M.*]

g. Parental Consent.—No license shall issue for the marriage of a male under twenty-one or a female under eighteen years, and not before married, without the consent of the parent or guardian personally given or certified in writing to the clerk, his or her signature attested by two or more witnesses and proved by the oath of one of them, provided that when such oath is administered by an officer having no seal and residing outside the county where the license is to be issued, such oath and consent shall not be received unless the signature and official capacity of the officer shall be certified by the county clerk of the county of his residence (2973). *Penalties.* [See 2980 under 1k.] Anyone falsely personating the parent or guardian in obtaining a license, or forging their names to any writing purporting to give consent, shall be imprisoned not exceeding three years (2978). *The validity of the marriage of a girl over fourteen years is not affected by want of parental consent thereto (1).* [As to annulment below the age of consent in absence of parental consent, see 3006 and 3007 under 1f.]

h. Mental and Physical Qualifications.—Marriage is prohibited and declared void with an idiot, lunatic, person afflicted with syphilis or gonorrhea that is incurable, or with a person subject to chronic epileptic fits unless a female over forty-five years (2967). [As to penalty for license issuance, see 2980 under 1k.] [Note: Every physician treating venereally diseased individuals shall advise against marriage where such disease is in a communicable form, and violation of this provision is punishable by imprisonment not exceeding six months, fine not exceeding $300, or both (L. 1919, ch. 52, §§3, 9; 7905).]

i. Form of License.—No provision.

j. Record of License.—The county clerk shall keep a register of marriages as provided by law (1538). [This provision would seem to require record only after return as specified in 2976, under 3b.—G.M.] [As to clerk's filing license applications and affidavits of legal impediment, see 2972 and 2974 under 1k.]

k. Other Provisions.—Marriage license may be issued by the clerk only upon there being filed in his office an application contain-

ing the names, residence, date and place of birth of the parties, and the names, birthplaces, and distinctive race or nationality of their parents (2972, as amended L. 1919, ch. 61). The clerk shall not issue a license when the parties are personally unknown to him until the applicant makes an affidavit before him, which he shall file and preserve, showing that there is no lawful reason in the way of such marriage (2974). *Penalties.* The party making affidavit or any subscribing witness, if he swear falsely therein, is guilty of perjury (2974), punishable by imprisonment of from one to ten years (7987). Every clerk or deputy knowingly issuing a license for any prohibited marriage shall be punished by imprisonment not exceeding two years, fine not exceeding $1,000, or both, and shall be expelled from his office; and if he wilfully issues a license contrary to his duty he shall be fined not exceeding $1,000 (2980). [As to prohibited marriages, see 2967 under 1f, 1h, 4b, 4c.]

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by ministers of the gospel or priests of any denomination in regular communion with any religious society, by justices of the peace, mayors of cities, and judges of district and supreme courts (2971).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—No marriage shall be solemnized without a license therefor (2972, as amended L. 1919, ch. 61). *Penalty.* Any person solemnizing a marriage without a license shall be imprisoned from one to twelve months, fined not exceeding $1,000, or both (2977).

d. Form of Ceremony.—The certificate returned by the officiant must give the names of two or more witnesses present at the marriage (2975).

e. Common Law Marriage.—Marriage is prohibited and declared void when not solemnized by an authorized person, except as provided in §2970 (2967). [See 2f.] *Although common law marriages are not now recognized (2), until 1888 marriage could be contracted as at common law and, though the relation had to be monogamous (3), the "sealing ceremony" of the Mormon Church (4) or a mere oral contract on the highway without cohabitation sufficed to create it (5), and consent thereto could be implied from the acts of the parties (4, 5).*

f. Irregular Solemnization.—No marriage solemnized by a person professing to have authority therefor shall be invalid for want of such authority if consummated with the belief of the parties, or either of them, that the marriage was lawful (2970). *Penalty.* Any person not authorized, solemnizing a marriage under the pretense of having authority, shall be imprisoned not exceeding three years (2978).

g. Other Provisions.—*Penalty.* Any authorized person knowingly solemnizing a marriage such as is prohibited, with or without license, shall be imprisoned not exceeding three years, fined not exceeding $1,000, or both (2979). [As to prohibited marriages, see 2967 under 1f, 1h, 4b, 4c.]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant within thirty days after the marriage shall return the license to the issuer with a signed certificate giving the date and place of celebration and the names of two or more witnesses present at the marriage (2975). The certificate of marriage given to the female must show the name of the county from which the license issued and the date of issuance (2972, as amended L. 1919, ch. 61). *Penalty.* For failure to make return as required the officient is guilty of a misdemeanor (2975), punishable by imprisonment not exceeding six months, fine less than $300, or both (7905).

b. Local Record.—The license, together with the officiant's certificate, shall be filed by the clerk and recorded in a book properly indexed (2976). *Penalty.* Every wilful omission to perform any duty enjoined by law upon any public officer is punishable as a misdemeanor (8013) by imprisonment not exceeding six months, fine not exceeding $300, or both (7905).

c. State Record.—The blanks for license applications and returns, filled out by the county clerk, are to be transmitted monthly to the State Registrar of Vital Statistics to be kept on file in his office (2972, as amended L. 1919, ch. 61). [See 5.] *Penalty.* See 8013 under 3b.

d. Evidence.—Entries in public or official records, made by a public officer of this state in performance of his duty, are prima facie evidence of the facts therein stated (7093). [As to qualifications for admission of foreign official documents, see 7091.] *In jurisdictions like Utah where marriage is not legal without a license, which must be returned and recorded, a marriage may be established by the*

certificate or a certified copy of the record thereof, where the parties are identified (*6, 7*).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Marriages within the prohibited degrees are incestuous and void from the beginning (2966). *Penalty.* A person knowingly marrying another related within and not including the fourth degree of consanguinity computed according to civil law shall be imprisoned for from three to fifteen years (8089). [It would seem that cohabitation under marriages of fourth degree relatives and others which are declared absolutely void by §2966 would be punishable as fornication by imprisonment not exceeding six months or fine not exceeding $100 (8090).—G.M.] *The statute groups together the different degrees of relationship to which it applies and, without specific enumeration, includes the uncle-niece relation* (*8*).

b. Proper Civil and Racial Status.—Marriage is prohibited and declared void between a white person and a Negro or Mongolian (2967). *Penalty.* An act is a misdemeanor when its performance is prohibited by statute and no penalty imposed (8014) and is punishable by imprisonment not exceeding six months, fine less than $300, or both (7905). [As to penalty for issuing license and solemnizing such marriages, see 2980 under 1k and 2979 under 2g. As to cohabitation thereunder constituting fornication, see 8090 under 4a.]

c. Proper Legal Status.—Polygamous and plural marriages are forever prohibited (Const. Art. III, §1; Enabling Act, §3). *Marriage must be monogamous* (*3*); *a plural marriage is void* (*3, 9*). Every person having a spouse living who marries another, and any man simultaneously marrying more than one woman, shall be punished by fine not exceeding $500 and imprisonment not exceeding five years, unless the spouse by the former marriage shall have been absent for five successive years, not known to such person to be living and believed dead, or unless the former marriage shall have been dissolved or pronounced void by a valid decree (8086). *In a polygamy prosecution evidence is not admissible that polygamy is part of one's religion* (*10*). *Cohabitation with two women and holding both out as wives, when adequately established* (*11*), *constitutes polygamy without actual proof of sex relations* (*12, 13, 14, 15, 16, 17*).

Marriage is prohibited and declared void when there is an undivorced spouse living or when a divorced person married any person other than the divorced spouse within the period allowed for appeal

(2967) which may be taken within six months (6991), or until affirmance upon appeal, and marriages in violation hereof are null and void (3003). A decree of divorce shall not become absolute until six months after its entry (3001). *The marriage is invalid within the six months' period after an interlocutory decree of divorce (2). Where a plural wife continued to live with a man with no apparent change of relation after the death of his legal wife, the cohabitation continued unlawful in absence of a change being shown (18).*

d. Proper Consent of Parties.—*The validity of a marriage is not affected by lack of cohabitation or any secret intention of one party, unknown to the other, not to consider the agreement a marriage (4). Penalty.* Any person falsely personating another and in such assumed character marrying or pretending to marry or to sustain the marriage relation toward another, with or without the connivance of such other, is guilty of a felony (8340), punishable by imprisonment not exceeding five years (7904). Courts may declare void a marriage obtained by force or fraud (3007). *Penalty.* Any person taking a female with intent to compel her marriage to him or another, or taking a female for sexual intercourse upon pretense of marriage, shall be imprisoned not more than twenty years (8095).

5. STATE SUPERVISION

To enable the State Registrar of Vital Statistics to secure the necessary data concerning marriages, he shall provide each of the county clerks with blank forms with prepared headings, which shall be uniform throughout the state, on which to insert a transcript of the personal identification items entered on each application and to add the return (2972, as amended L. 1919, ch. 61).

6. INTERSTATE RELATIONS

Marriages valid where solemnized are valid here (2969).

UTAH CASES

1. State v. Stewart, 57 U. 224 (1920). **2.** Sanders v. Industrial Commission, 64 U. 372 (1924). **3.** Riddle v. Riddle, 26 U. 268 (1903). **4.** Hilton v. Roylance, 25 U. 129 (1902). **5.** U.S. v. Simpson, 4 U. 227 (1885). **6.** State v. Thompson, 31 U. 228 (1906). **7.** State v. Springer, 40 U. 471 (1911). **8.** State v. James, 32 U. 152 (1907). **9.** In re Wo-Gin-Up's Estate, 57 U. 29 (1920). **10.** U.S. v. Rey-

nolds, 1 U. 226 (1875); 1 U. 319 (1876); affirmed, 98 U.S. 145 (1878). **11.** U.S. v. Graham, 23 U. 278 (1901). **12.** U.S. v. Cannon, 4 U. 122 (1885); affirmed, 116 U.S. 55. **13.** U.S. v. Musser, 4 U. 153 (1885). **14.** U.S. v. Snow, 4 U. 280 (1886); dismissed, 118 U.S. 346. **15.** U.S. v. Peay, 5 U. 263 (1887). **16.** U.S. v. Harris, 5 U. 621 (1888). **17.** U.S. v. Clark, 6 U. 120 (1889). **18.** Beck v. Utah-Idaho Sugar Co., 59 U. 314 (1921).

VERMONT

REFERENCES: General Laws of Vermont, 1917; Acts and Resolves of Vermont, 1919, 1921, 1923, 1925, 1927; Reports through Volume 98.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the General Laws and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Vermont section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—The town clerk upon application shall issue to a person a marriage certificate (3790), and persons authorized to solemnize marriage shall require of the parties, before solemnizing such marriage, a certificate (3517, as amended A. 1925, No. 51). [The marriage license is also called a certificate or marriage certificate, in the sense of a certificate of intention to marry.—G.M.]

b. Issuer.—The marriage certificate is issued from the office of the clerk of the town where the groom resides, if a resident of the state; where the bride resides, if the groom is a non-resident; or where the marriage is solemnized, if neither is a resident (3517, as amended A. 1925, No. 51). The county clerk of a county wherein is situated an unorganized town or gore shall perform the same duties as town clerks in respect to marriage certificates and records and shall be subject to the same penalties when the parties both reside in an unorganized town or gore in such county, where the groom so resides and the bride resides in an unorganized town or gore in another county or without the state, or where the bride so resides and the groom resides without the state (3772). *Penalty.* A town clerk knowingly issuing a marriage certificate upon application of a person residing in another town in the state, or a county clerk other than as provided in §3772, shall be fined from $20 to $50 (3792).

c. Compensation of Issuer.—For issuing and recording a marriage certificate the town clerk receives a fee of $1.00 (7462, as amended A. 1919, No. 219). Town clerks receive such salaries as the town

may vote (A. 1919, No. 219, as amended A. 1921, No. 97), and county clerks are paid salaries by the state in lieu of all other compensation (7403, as amended A. 1921, No. 236).

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—A person shall not solemnize a marriage until five days after the marriage certificate has been issued except in cases of persons enlisted in the military or naval service of the United States and persons presenting a certificate signed by a judge of probate or of a municipal or county court authorizing the earlier solemnization of the marriage (3517, as amended A. 1925, No. 51). *Penalty.* A town clerk who falsely dates a marriage certificate shall be fined not exceeding $20 (3517, as amended A. 1925, No. 51).

f. Minimum Age.—A clerk shall not issue a marriage license or certificate when the male is under sixteen or the female under fourteen years unless he is furnished with a certificate from the probate, municipal, city, or superior judge of the district or county in which one of the applicants resides, if either is a resident of the state, otherwise of the district or county in which the marriage is to be consummated, that the public good requires such license to be issued (3795, as amended A. 1925, No. 54). *Penalty.* See 3795 under 1k. Action for annulment of a marriage where one of the parties was under sixteen years may be brought by the parent, guardian, or next friend of such minor if the parties do not cohabit after attaining such age (3548). [As to earlier unconfirmed marriages under the age of consent not being a basis for bigamy prosecution, see 7009 under 4c.] *Prior to this statute the common law ages of consent were recognized in Vermont (1, 2). The age of consent to marriage is entirely distinct from the age of consent to carnal intercourse; if a girl be over the former and under the latter her marriage is not subject to annulment (1).*

g. Parental Consent.—The clerk shall not issue a license or certificate when the male is under twenty-one or the female under eighteen years without the consent in writing of one of the parents or the guardian of such minor (3795, as amended A. 1925, No. 54). *The purpose of such statute is to give the parent, who has the greatest interest in preventing imprudent connexions (3), an opportunity to stop clandestine marriages (4). Penalties.* A clerk knowingly violating this section shall be fined not exceeding $20. A person aiding in procuring such license by falsely pretending to be the parent or

guardian having authority to give consent shall be fined not exceeding $500 (3795, as amended A. 1925, No. 54).

h. Mental and Physical Qualifications.—A clerk shall not issue a marriage license or certificate when either party is non compos mentis or to a person under guardianship without the written consent of such guardians (3795, as amended A. 1925, No. 54). *Penalty.* See 3795 under 1k. A marriage may be annulled when at the time either party was an idiot or lunatic—person of unsound mind (3554) —or was physically incapable of entering into the marriage state (3547). *The marriage of an insane person is not void in this state but only voidable in a direct proceeding (5). After annulment, however, the avoided marriage does not confer the man's settlement upon the woman (6). A malady, such as syphilis, which renders a person incapable of propagating healthy children and makes sexual relations impossible without great danger of communicating the disease, is a physical incapacity warranting annulment (7). Penalty.* A person, being told by a physician or knowing that he or she was infected with gonorrhea or syphilis, who marries without assurance and certification from a legally qualified physician and surgeon that he is free from such disease, shall be imprisoned not less than two years or fined not less than $500 (7035, as amended A. 1919, No. 179). [*As to concealment of pregnancy constituting fraud, see* 4d.]

i. Form of License.—The declaration of intention of marriage contains for each party the name, residence, color, birthplace, number of marriage and whether divorced, the parents' names (including mother's maiden name) and birthplaces, and the occupation of the expectant groom. Attached thereto is place for the clerk's certification, the officiant's certificate, and the oath of the parties (3791). [Note: The written consent of the parent, judge, guardian, or overseers of the poor, when required for the marriage of minors, feebleminded, and paupers, must be attached to the original license (3795, as amended A. 1925, No. 54).]

j. Record of License.—The town clerk shall enter the names of the parties and retain a copy of the marriage certificate (3790) and must certify on the declaration that he has filed a copy thereof (3791). *Penalty.* A town or county officer wilfully neglecting to perform the duties imposed upon him by law shall be imprisoned not more than one year, fined not more than $1000, or both (7104).

k. Other Provisions.—An applicant for a marriage certificate shall be required to sign and make oath to the declaration of inten-

tion contained in the certificate (3790). [See 1i.] *Penalties.* A clerk issuing a certificate without first requiring the applicant to fill out, sign, and make oath to the declaration shall be fined from $20 to $50 (3792). Any applicant making a material misrepresentation shall be guilty of perjury (3793), punishable by imprisonment not exceeding fifteen years and fine nor exceeding $1000 (7045 and 7046). Before issuing a license or certificate the clerk shall satisfy himself by requiring affidavits or other proof that neither party is prohibited from marrying by the laws of the state of his or her residence (3794, as amended A. 1925, No. 54). *Penalty.* A clerk issuing a license with knowledge that the parties are prohibited by law from marrying shall be fined not exceeding $100 (3794, as amended A. 1925, No. 54). A clerk shall not issue a license or certificate for the marriage of a town pauper without the written consent of the selectmen or overseer of the poor of each of the towns which are liable for the support of the parties (3795, as amended A. 1925, No. 54). *Penalty.* A clerk knowingly violating a provision of this section shall be fined not exceeding $20 (3795, as amended A. 1925, No. 54).

2. SOLEMNIZATION

a. Officiant.—Marriages may be solemnized by a justice in the county for which he is appointed, by a minister ordained or otherwise regularly authorized by his denomination, residing in this state or an adjoining state or country when his parish lies wholly or partly in this state, or among Quakers in the manner used in such societies (3516, as amended A. 1923, No. 56).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—The officiant shall receive a certificate from the parties (3796) before solemnizing the marriage, the certificate so required affording to the officiant full immunity from responsibility (3517, as amended A. 1925, No. 51). [Cf. §3794 under 2g.] *Penalty.* A person solemnizing a marriage without first obtaining of the parties the required certificate shall be fined not less than $10 (3797). *Under a former statute the officiant was subject to a civil penalty (8).*

d. Form of Ceremony.—[No general provision.] Marriages among Quakers may be solemnized in the manner heretofore used in such societies (3516, as amended A. 1923, No. 56).

e. Common Law Marriage.—No statutory provision. *The loose doctrine of the common law as to marriages has never been in force in*

this state, our statutes impliedly declaring the nullity of a marriage not in accord with their requirements (9). A contract per verba de praesenti *does not constitute marriage (10), a statement in a case holding the contrary (11) being mere dictum (9). Common law marriages not being recognized, cohabitation after removal of an impediment to marriage cannot create marriage out of an illicit relation (9): a subsequent marriage in fact would have to be proved (10).*

f. Irregular Solemnization.—The validity of a marriage solemnized before a person professing to be a justice or minister shall not be affected on account of want of jurisdiction in such person if otherwise lawful and consummated with the belief of the parties or either of them that they were lawfully married (3519). *Penalty.* A person undertaking to join others in marriage knowing that he is not authorized so to do shall be imprisoned not exceeding six months or fined from $100 to $300 (3518).

g. Other Provisions.—*Penalty.* An authorized officiant knowingly solemnizing a marriage of parties prohibited by law from marrying shall be fined not more than $100 (3794, as amended A. 1925, No. 54). [As to five days' delay in solemnizing a marriage, see 3517 under 1e.]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—An officiant shall fill out any blanks in the certificate, add the date of marriage and his official signature, and return the certificate to the issuer within ten days from the date of marriage (3796). *Penalty.* If he fails so to do he shall be fined not less than $10 (3796). A male resident of this state married without the state shall deposit with the clerk at his residence within sixty days a certificate embracing the statistics required by law in marriage certificates (3799). *Penalty.* Upon failure so to do he shall be fined not less than $10 (3799). The town clerk upon receipt of the certificate shall complete the copy of the license kept on file to conform to the certificate, and such copy shall be at the disposal of the parties (3790).

b. Local Record.—A town clerk shall receive, number, and file certificates of marriages in the order of their occurrence (3775), bind, index, and keep them as a permanent record (3776), and compile annually a transcript in a form prescribed by the State Board of Health of the record of marriages recorded, to be published by the auditor (A. 1921, No. 86, as amended A. 1925, No. 55). The clerk

each month shall make a certified copy of all marriages filed in his office whenever a party thereto was at the time resident in another town, which he shall transmit to the clerk of the town in which such party was resident, and the clerk shall file such copies received (3777). [Note: The head of a family moving into the state may record with the clerk a certificate of marriage (3800).]

c. State Record.—Town clerks shall transmit each month to the secretary of the State Board of Health a certified copy of each marriage certificate received during the month (3779), which returns shall be filed and indexed by the Secretary of State (380, as amended A. 1927, No. 7). *Penalties.* A town clerk failing to transmit such copies shall be fined not less than $20 (3781). [See A. 1919, No. 92, under 5.]

d. Evidence.—A certified copy of the marriage record made at the time of solemnization by a person legally required to keep the record, or by the town or city clerk or Secretary of State, shall be presumptive evidence of the fact of marriage (3798; 1903). *Inasmuch as the statute requires the town record to conform in all respects to the officiant's certificate returned, a copy of a record containing only a statement by the clerk and name of the officiant is not admissible (12). But a certified copy of a town record is admissible even if not signed by the clerk if in his handwriting (10), even if it does not show of what town he is clerk if containing all necessary data (13), and even if the name of only one party to the marriage is shown (10). For admissibility of a paper purporting to be a certificate of marriage there must be evidence that there was such a person as the officiant named in the paper (14), if the marriage took place in another state that he was authorized by law to solemnize marriages (14, 15), and that the signature is genuine (12, 14, 16) and official (17).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (3510, 3511). *The marriage of a man with the daughter of a half-brother is within the prohibition (18).* If the relationship is founded on marriage, the prohibition shall continue notwithstanding the dissolution of such marriage, unless originally void (3512). Marriages prohibited on account of relationship shall be void without legal process (3544). *Penalty.* Persons marrying contrary to the legal prohibitions shall be punished (7012) by imprisonment not exceeding five years, fine not exceeding $1000, or both (7005).

b. Proper Civil and Racial Status.—No provision. [As to prohibition of issuance of license for the marriage of a pauper, see 3795 under 1k.]

c. Proper Legal Status.—Marriages contracted while either party has a former spouse living shall be void, unless the former marriage has been dissolved (3513), without legal process (3544). *The marriage of a person already married is void (9, 19) without adjudication (19) and establishes no obstacle to the marriage of the previously unmarried party with a third person (20). The courts at the domicil of the parties may declare null a marriage because of a prior subsisting marriage regardless of where contracted (21).* A person having a spouse living who marries another or continues to cohabit with such second spouse shall be imprisoned not exceeding five years, unless the former marriage has been avoided or dissolved or was contracted under the age of consent and not afterwards assented to, or unless the spouse has been continually out of the state for seven years together and not known to the party marrying to be living within that time (7009). *For cohabitation in this state to be unlawful the second marriage must have been unlawful where contracted (22). Honest belief in the death of a spouse is no defense to a charge of bigamy if the later marriage was contracted within seven years (23).*

A decree nisi for divorce shall become absolute only after six months from entry unless an earlier date is fixed by the court granting the decree (A. 1927, No. 50). Though after a divorce the parties may lawfully marry again, it shall not be lawful for the libellee to marry a person other than the libellant for two years after divorce, unless the libellant dies (3602, as amended A. 1925, No. 53). *Penalty.* A person violating the preceding section and living in this state under a marriage forbidden thereby shall be imprisoned not exceeding five years, fined not more than $1000, or both (3603, as amended A. 1921, No. 82). *A marriage in this state within the prohibited period after a divorce granted here is absolutely void (24, 25, 26, 27).* [*As to remarriage in another state after a Vermont divorce, see* 6.] *A later ceremonial marriage is presumed valid in absence of proof that the spouse by an earlier marriage was living at the time (28).*

d. Proper Consent of Parties.—The marriage contract may be annulled when the consent of either party was obtained by force or fraud (3547) if there was no voluntary cohabitation as husband and wife (3555). *The mere fact of a marriage ceremony without the consent of the parties is of no validity (29, 30). A marriage, at least if unconsummated, may be annulled for fraudulent representations inducing*

it (31), as for example if a pauper woman, threatened with starvation as an alternative to a marriage encouraged in order to shift her settlement, is married to a man who never intends to fulfil and never fulfils the obligations of the relation (32). A marriage may be annulled, regardless of cohabitation, for fraud in wilful concealment of chronic and incurable syphilis at the time of marriage (7) or of pregnancy by another man at that time (33). "Voluntary cohabitation" includes not all willing cohabitation but only cohabitation with knowledge of the fraud (33). A marriage induced by constraint and not consummated is void (29): the marriage of a man under arrest for bastardy maliciously procured without probable cause, the man never having had sexual connexions with the woman, may be annulled for duress (34).

5. STATE SUPERVISION

The Secretary of State, ascertaining from what towns and for what years incomplete returns of marriages have been made to the state, shall convey this information to the clerks of such towns together with suitable blanks for such returns, and the clerks under the directions of the Secretary of State shall cause to be transcribed all records of marriages in the possession of the towns and churches and shall transmit them to the Secretary of State (A. 1919, No. 92), and in case the town officials fail to obtain and file the records required, the Secretary of State shall procure such records at the expense of the town (A. 1919, No. 92, as amended A. 1921, No. 89). The State Board of Health shall prescribe the form for the transcript of the record of marriages compiled by the town clerks and published by the auditors (A. 1921, No. 86, as amended A. 1925, No. 55).

6. INTERSTATE RELATIONS

Generally the law of the place of contract governs both the formalities of marriage and the capacity of the parties (25): a marriage valid where contracted is valid everywhere (25, 26, 35). If a resident of this state, intending to remain so resident, contracts in another jurisdiction a marriage prohibited and declared void by the laws of this state, such marriage is void in this state as if entered into here (3514). A marriage contracted in this state by a resident of another jurisdiction, intending to remain so resident, is void here if it would be void if contracted in such other jurisdiction (3515). [As to penalty for knowingly issuing license for or celebrating a prohibited marriage, see 3794 under 1k and 2g.] *In absence of a statute declaring the nullity of marriages contracted outside the state within the prohibited period*

after a divorce in this state [see 3602 under 4c] *the prohibition has no extraterritorial effect* (*25, 26, 35*). [*Since the enactment of §3514, quaere.—G.M.*] *Nor does the statute of another state prohibiting remarriage after divorce affect the validity of a marriage contracted there after a divorce granted here* (*36*).

7. SEX OFFENSES AND MARRIAGE

No statutory provision. *Intermarriage of the complainant and defendant in a bastardy proceeding, after birth of the child but before trial, terminates the action* (*37*).

VERMONT CASES

1. Fisher v. Bernard, 65 v. 663 (1893). **2.** Pool v. Pratt, 1 D. Chip. 252 (1814). **3.** Holgate v. Cheney, Brayton 158 (1819). **4.** Ellis v. Hull, 2 Aikens 41 (1826). **5.** Wiser v. Lockwood's Estate, 42 V. 720 (1870). **6.** Reading v. Ludlow, 43 V. 628 (1871). **7.** Ryder v. Ryder, 66 V. 158 (1892). **8.** Campbell v. Shattuck, 2 Aikens 109 (1827). **9.** Morrill v. Palmer, 68 V. 1 (1895). **10.** Northfield v. Plymouth, 20 V. 582 (1848). **11.** Newbury v. Brunswick, 2 V. 151 (1829). **12.** State v. Colby, 51 V. 291 (1878). **13.** State v. Potter, 52 V. 33 (1879). **14.** State v. Horn, 43 V. 20 (1870). **15.** Frederick v. Morse, 88 V. 126 (1912). **16.** Fratini v. Caslini, 66 V. 273 (1894). **17.** State v. Brink and Gibbs, 68 V. 659 (1896). **18.** State v. Wyman, 59 V. 527 (1887). **19.** Pingree, Administrator, v. Goodrich, 41 V. 47 (1868). **20.** State v. Sherwood, 68 V. 414 (1896).

21. Barney v. Cuness, 68 V. 51 (1895). **22.** State v. Palmer, 18 V. 570 (1846). **23.** State v. Ackerly, 79 V. 69 (1906). **24.** Ovitt v. Smith, 68 V. 35 (1895). **25.** State v. Shattuck, 69 V. 403 (1897). **26.** State v. Richardson, 72 V. 49 (1899). **27.** State v. Sartwell, 81 V. 22 (1908). **28.** Greensborough v. Underhill, 12 V. 604 (1839). **29.** Mountholly v. Andover, 11 V. 226 (1839). **30.** Clark v. Field, 13 V. 460 (1841). **31.** Parsons v. Parsons, 68 V. 95 (1895). **32.** Barnes v. Wyethe, 28 V. 41 (1855). **33.** Sweeney v. Sweeney, 96 V. 196 (1922). **34.** Shoro v. Shoro, 60 V. 268 (1888). **35.** Patterson's Admr. v. Modern Woodmen of America, 89 V. 305 (1915). **36.** State v. Bentley, 75 V. 163 (1902). **37.** Gordon v. Amidon, 36 V. 735 (1864).

VIRGINIA

REFERENCES: Virginia Code of 1924; Supplement, 1926; Acts of the General Assembly of Virginia, 1927 (special session); Reports through Volume 145.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Code unless the Supplement thereto is specifically cited. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Virginia section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Every marriage in this state shall be under a license (5071). *Though under a former provision a marriage was not void for want of license (1), the present code requirement is mandatory (2).*

b. Issuer.—Every license for a marriage shall be issued, in the case of a resident female, by the clerk of the circuit court of the county or of the corporation court of the city in which the female to be married usually resides, or by his deputy; in case of a non-resident, by the same officers where the marriage is to be solemnized; in case of inability of the clerk or deputy to issue the license, by the judge of such courts, who shall make return to the clerk (5072).

c. Compensation of Issuer.—For issuing a marriage license clerks of courts receive $1.00 (3484). All fees above a maximum fixed for various counties according to population shall be paid into the state treasury by the court clerks (Sup. 3516). [Note: The clerk shall collect for each wafer affixed to the license $2.00, which tax shall be paid into the state treasury without commission (5072).]

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—[No provision as to advance notice.] It shall be legal for any person knowing that an applicant for a marriage license is subject to disability as habitually criminal, mentally defective, epileptic, or insane to appear before the clerk and present evidence why such license should not be granted (5088a).

f. Minimum Age.—[No statutory provision as condition to license issuance.] A marriage solemnized when either of the parties was under the age of consent, fourteen years in males and twelve in females, shall be void without legal process if they separate during such nonage and do not afterwards cohabit (5090).

g. Parental Consent.—If a party be under twenty-one years and not previously married the consent of the father or guardian or, if there be none, of the mother, shall be given to the issuer either personally or in writing, acknowledged before a notary public or subscribed by a witness who shall make oath before the issuer that said writing was signed or acknowledged in his presence. If there be no father, guardian, or mother, the judge of the circuit or corporation court at the female's residence on application may authorize issuance of a marriage license (5078). *The marriage of a person of the age of consent is valid regardless of want of parental consent (3, 4). Penalties.* [See 5094 and 4541 under 1k.] *The $10 forfeiture goes to the state; the parent has no right to sue for loss of services of an infant daughter occasioned by and following her marriage (3).* Falsely making oath that a person is twenty-one years of age in order to obtain a marriage license is perjury (4493), punishable by imprisonment of from one to ten years, or in the jury's discretion by confinement in jail not exceeding one year, fine not exceeding $1000, or both (4494). *This statute was enacted as the result of a decision denying to the clerk the authority to administer an oath as to the parties' age (5) and makes criminal false swearing before the clerk as to age (6).*

h. Mental and Physical Qualifications.—No woman under forty-five years or man of any age, unless marrying a woman over forty-five years, who is a habitual criminal (one who has been convicted at least three times of felonious crimes), idiot, imbecile, hereditary epileptic, or insane person, and no person of any age who is afflicted with any contagious venereal disease, hereafter shall marry within this state, and no clerk of court shall knowingly issue a license for the marriage of such person. The clerk may accept as sufficient evidence the affidavit of the male applicant that he is free from venereal disease and that he believes the woman to be free, and if not satisfied as to idiocy, feeble-mindedness, imbecility, hereditary epilepsy, or insanity, may follow the recommendation of the chairman of the board of health of his county or city or of some duly licensed physician of his selection, for which examination and report a fee not exceeding $2.50 may be charged to the applicants. The person refused a license by the clerk may appeal at his own cost to

the city or corporation court at the female's residence, with further appeal to the Court of Appeals (5088a). *Penalty.* Any person knowingly violating this act is punishable by fine not exceeding $100, confinement not exceeding ninety days, or both (5088a).

All marriages solemnized in this state when either party was insane or incapable from physical causes of entering the marriage state shall be void from the time that they are so declared by decree of divorce or nullity (5088). The marriage of a person lawfully adjudged to be insane, epileptic, or feeble-minded, and admitted to any state hospital for the insane, shall be absolutely void without legal process, and when the superintendent of the hospital where such person was a patient shall report on oath to the issuer the fact that such person was a patient, the issuer shall enter this fact on the record of license and mark it void (5088b). *Penalty.* Any person knowingly marrying such a patient shall be confined not exceeding six months, fined not exceeding $500, or both (5088b). Absolute divorce may be granted where the wife at the time of marriage was with child by another person without knowledge of the husband who has not cohabited with her after obtaining such knowledge (Sup. 5103).

i. Form of License.—The clerk shall affix to the license a wafer bearing the seal of the court (5072).

j. Record of License.—An abstract of every license shall be entered in the marriage register at the time of issuance (5075). *Penalties.* See 5094 under 1k and 4491 under 3b.

k. Other Provisions.—The issuer shall ascertain from the applicant, as near as may be, and make certificate of the date and place of the proposed marriage, the names, age, race, birthplace, residence, and condition—whether single, widowed, or divorced—of the parties, the names of their parents, and occupation of the husband (5074). The issuer shall not grant a license until he has reasonable assurance as to the correctness of the statements as to color of the parties, and in case of reasonable disbelief shall withhold the license until satisfactory proof is produced that the applicants are of the color as claimed (5099a). [Other provisions of this act for the preservation of racial integrity appear under 4b.] *Fraud perpetrated upon the license issuer, not known to the officiant, does not itself make a marriage utterly void (4). Penalties.* Any clerk failing to perform any duty required of him under this chapter on marriage shall forfeit $10 for every offense (5094), and if knowingly issuing a marriage

license contrary to law shall be confined not exceeding one year and fined not exceeding $500 (4541).

2. SOLEMNIZATION

a. Officiant.—Marriage may be celebrated by a minister of any religious denomination, properly licensed and bonded (5079), by persons appointed by the circuit or corporation courts to celebrate marriage within their jurisdictions (5080), and by religious societies having no ordained minister (5081).

b. Officiant's Credentials.—The circuit court of any county or corporation court of any city, or judge thereof, before whom a minister of any religious denomination shall produce proof of his ordination and regular communion with the religious society shall make an order—which may be rescinded at any future term (5080)—authorizing such minister to solemnize matrimony within this state upon execution of a bond in the penalty of $500 with surety conditioned according to law (5079), and any civil officiant appointed by the proper court must give similar bond (5080). *Penalty.* See 4542 under 2f.

c. Presentation of License.—*Penalty.* A person knowingly solemnizing marriage without lawful license shall be confined not exceeding one year and fined not exceeding $500 (4542).

d. Form of Ceremony.—[No general provision.] Marriages between persons belonging to any religious society having no ordained minister may be solemnized in the manner prescribed in such society (5081).

e. Common Law Marriage.—Every marriage in this state shall be under a license and solemnized in the manner herein provided (5071). *The statutory requirements for marriage are mandatory; common law marriages contracted in Virginia are not recognized (2, 7, 8). Cohabitation and reputation of persons as husband and wife do not constitute marriage, and though they raise a presumption of a valid marriage having been contracted, this may be overcome by countervailing evidence (8, 9).*

f. Irregular Solemnization.—The validity of a marriage solemnized under a license, issued in the state, by a person professing to be authorized shall not be affected by any want of authority in such person or by any defect in such license if otherwise lawful and consummated with a belief of the parties or either of them that they

have been lawfully married (5082). *Though common law marriages are void, this statute validating a marriage contracted by virtue of a defective license, or license issued without authority, gives validity to the marriage of a minor notwithstanding the parents' lack of authorization to the license issuer* (*3*). Failure to affix the required stamp to the license does not invalidate the license or marriage thereunder (5072). *Penalty.* Any person celebrating a marriage without being authorized by law to do so shall be confined not exceeding one year and fined not exceeding $500 (4542).

g. Other Provisions.—No officiant shall knowingly unite in marriage persons either of whom is a habitual criminal, idiot, imbecile, hereditary epileptic, or insane person, unless the female is over forty-five years, or any person of any age who is afflicted with contagious venereal disease, and any person knowing any applicant for marriage to be subject to any of these disabilities may appear before the officiant and present evidence why such ceremony should not be performed (5088a). *Penalty.* See 5088a under 1h. *Penalty.* Any person performing a marriage between a white person and a colored person shall forfeit $200 of which the informer shall have half (4547). [Note: Any officiant shall be paid by the husband a fee of $1.00, and for exacting a greater fee shall forfeit to the party aggrieved $50 (5083).]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—Every officiant within thirty days after a marriage shall return to the issuer the license and certificate, together with his own certificate of the time and place of marriage (5074). *Penalties.* Any officiant violating this section shall be liable to fine of from $10 to $20 for each offense (5074), and the condition of his bond shall be deemed broken (5093). [See also 4491 under 3b.] If either party at the time of a marriage out of this state be a resident of this state a certificate, verified by the affidavit of a witness to such celebration, may be returned to the clerk of the county or city in which the husband resides if he be the resident, or in which the woman resides (5077).

b. Local Record.—The clerk, who is required to keep a book called "the marriage register" (5092), upon receipt of the license and certificate shall file them within twenty days, shall enter in the register the officiant's certificate, and shall make an index (5076). An abstract of the return of out-of-state marriages shall be recorded by the clerk (5077). [See 5077 under 3a.] *Penalties.* [See 5094

under 1k.] Any clerk of court, officiant, or clerk of any religious society, knowingly making any false entry, record, registration, or written statement, shall be fined from $100 to $500 for every such offense (4491), and any person, upon whose statement any record may lawfully be made, knowingly giving any false information, shall be fined from $50 to $100 for every such offense (4492).

c. State Record.—The clerk of court shall transmit annually to the Bureau of Vital Statistics a copy of his marriage register and his record made at the time of license issuance, distinguishing the licenses issued in which the minister's certificate has not been returned (5096), which copies shall be filed in the office of the bureau—bound and indexed (1584a)—and from which the bureau annually shall prepare an abstract (5097).

d. Evidence.—The books kept by the clerks and certified copies thereof shall be prima facie evidence of the facts therein set forth (5074; 5098). Public records of other states are admissible if attested by their keeper and properly certified and authenticated (6206). *Absence of a record of marriage at the place in another state where the marriage is alleged to have been contracted does not preclude other proof of the marriage, especially where the record could possibly be elsewhere (10). A certificate of marriage made by the officiant and returned to the court as required is admissible though not showing the officiant's authority (11).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (5084; 5085). In the cases mentioned in which relationship is founded on marriage the prohibition shall continue notwithstanding the dissolution of such marriage (5086). All marriages prohibited on account of consanguinity or affinity shall be void from the time they are so declared by a decree of divorce or nullity or from the time of conviction under §4540 (5088). *Penalty.* Any person marrying in violation of §5084 or §5085 shall be confined not exceeding six months or fined not exceeding $500 (4540). [As to out-of-state marriages, see 4540 under 6.]

b. Proper Civil and Racial Status.—All marriages between a white person and a colored person shall be absolutely void without legal process (5087). It shall be unlawful after 1924 for any white person to marry any save a white person—one having no trace whatsoever of any blood other than Caucasian—or a person of other admixture of blood than white and American Indian of one-sixteenth

degree or less, and all laws regarding intermarriage of white and colored persons shall apply to marriages prohibited by this act (5099a). *Formerly interracial marriages were not prohibited if the colored person had less than one-quarter Negro blood* (*12*, *13*). *Penalty.* White persons and colored persons who intermarry shall be imprisoned for from two to five years (4546). *Miscegenetic marriages are void, criminal, and contrary to public policy* (*14*, *15*). [As to penalty on officiant, see 4547 under 2g. As to penalty for such marriages contracted outside the state, see 4540 under 6. As to prohibition of marriage of habitual criminals, see 5088a under 1h.]

c. Proper Legal Status.—All marriages prohibited by law on account of either party having a former spouse then living shall be absolutely void without legal process (5087). *The later marriage of a party to an earlier subsisting marriage is void* (*16*, *17*). Any married person marrying another during the subsistence of a former marriage shall be imprisoned for from three to eight years (4538), unless the former spouse shall have been continually absent for the seven years preceding such marriage and not known to be living within that time, or unless the person remarrying contracted such second marriage in good faith under reasonable belief that the former consort was dead, or unless he was divorced from the former marriage, although the term at which the decree for divorce was entered was not ended, or unless the former marriage was void (4539). *A marriage after an invalid divorce from another spouse is bigamous* (*18*).

Neither party to a divorce shall be permitted to marry again for six months from the date of such decree and the bond of matrimony shall not be deemed to be dissolved as to any marriage subsequent to such decree or in prosecution on account thereof until the expiration of such six months (5113), and, with the same effect, in granting a divorce for adultery the court may decree that the guilty party shall never marry again, though for good cause such decree as to the guilty party may be revoked after six months (5114). *Though a divorce absolves the parties from marital duties, within the forbidden period it does not so dissolve the relation as to allow of another marriage, and a remarriage is void* (*7*). *The provision allowing prohibition of remarriage for an indefinite period applies only in case of divorce for adultery* (*19*) *and is a wise discretionary power to be given to the courts* (*20*). *Aside from statute a court has no power to impose restrictions on remarriage* (*19*).

d. Proper Consent of Parties.—*Marriage is a civil contract deriving its obligation from the consent of the parties and is not affected by a*

change of government so long as valid by the law prevailing at the time of contract (21). Absolute divorce may be granted to a husband whose wife prior to marriage had been a prostitute without his knowledge if he did not cohabit with her after obtaining such knowledge (Sup. 5103). [As to divorce for concealment of pregnancy, see Sup. 5103 under 1h.] *A marriage entered into only to avoid prosecution for seduction is not for that reason voidable for duress (22). Penalty.* Any person taking or detaining a female unlawfully against her will with intent to compel her marriage to him or another is punishable by confinement of from one to ten years and fine not exceeding $1000 (4579).

5. STATE SUPERVISION

The Bureau of Vital Statistics shall furnish the issuers with all forms and instructions deemed necessary for carrying into effect the provisions of this chapter on marriage (5095). A list of all marriage licenses issued that have not been returned by the officiant shall be furnished annually by each issuer to the commonwealth's attorney who shall have the persons summoned before the grand jury to ascertain the name of the officiant failing to enter such license and certificate (5074). *Penalty.* For failure to perform the duty required by this section the clerk shall be liable to fine of $20 (5074). [See 5096 under 3c.]

6. INTERSTATE RELATIONS

The marriage of residents of this state shall be governed by identically the same law as if solemnized here when such residents who are within the degree of relationship within which marriages are prohibited, or one of whom is a white person and the other colored, has a former spouse living (5089), or is a lawfully committed patient of any state hospital for the insane, epileptic, or feeble-minded, with intent of returning to reside here shall go into another jurisdiction, intermarry, and return to reside here as husband and wife (5088b). *Penalty.* Residents of this state within the prohibited degrees of relationship, or one a white and the other a colored person, being so married outside this state and returning to reside in it, shall be punished as if the marriage had been in this state (4540). [As to such punishment, see 4540 under 4a and 4546 under 4b.] *Though the formalities as to marriage are regulated by the law of the place of contract, the validity depends upon the law of the parties' domicil, certainly if the marriage is polygamous, incestuous, or contrary to*

public policy (7, 14, 23). Intermarriage of white and colored persons (14, 15) and remarriage after divorce are such matters of public policy, governed by the law of the parties' domicil regardless of where contracted (7). Every country can make laws regulating the marriage of its own citizens (7), and the statute attaching to the acts of a citizen abroad the same consequences as to acts at home violates no doctrine of federal law (23).

7. SEX OFFENSES AND MARRIAGE

Subsequent marriage of parties may be pleaded in bar of a conviction for seduction or abduction for purpose of prostitution (4413), and in case of carnal knowledge with the consent of a female between fourteen and sixteen years, subsequent marriage may be pleaded to the indictment and the cause continued on good behavior of the husband until the wife is sixteen and then dismissed (4414).

VIRGINIA CASES

1. Colston v. Quander, 1 V. Dec. 283 (1877). **2.** Offield v. Davis, 100 V. 250 (1902). **3.** Stanley v. Rasnick, 137 V. 415 (1923). **4.** Payne v. Payne, 295 Fed. 970 (1924); 54 App. D.C. 149. **5.** Comm. v. Williamson, 4 Grat. 554 (1847). **6.** Maybush v. Comm., 29 Grat. 857 (1878). **7.** Heflinger v. Heflinger, 136 V. 289 (1923). **8.** Vanderpool v. Ryan, 137 V. 445 (1923). **9.** Eldred v. Eldred, 97 V. 606 (1899). **10.** Reynolds v. Adams, 125 V. 295 (1919). **11.** Moore v. Comm., 9 Leigh 639 (1838). **12.** McPherson v. Comm., 28 Grat. 939 (1877). **13.** Jones v. Comm., 80 V. 538 (1885). **14.** Kinney v. Comm., 30 Grat. 858 (1878). **15.** Greenhow v. James' Ex'or., 80 V. 636 (1885). **16.** Stones v. Keeling, 5 Call 143 (1804). **17.** Brown v. Brown, 2 V. Dec. 308 (1896). **18.** Corvin v. Comm., 131 V. 649 (1921). **19.** Shelton v. Shelton, 125 V. 381 (1919). **20.** Musick v. Musick, 88 V. 12 (1891). **21.** Oneale v. Comm., 17 Grat. 582 (1867). **22.** Copeland v. Copeland, 2 V. Dec. 81 (1895). **23.** Ex parte Kinney, 3 Hughes 9 (1879); also, Fed. Cas. No. 7825.

WASHINGTON

REFERENCES: Remington's Compiled Statutes of Washington (three volumes), 1922; Supplement, 1923; Session Laws of Washington, 1925, 1927; Reports through Volume 140.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Compiled Statutes and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Washington section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Before any persons can be joined in marriage they shall procure a license authorizing any officiant so to join them (8450). *Absence of a license does not invalidate a marriage otherwise valid (1).* [*But see* 2e.]

b. Issuer.—License is procured from a county auditor (8450).

c. Compensation of Issuer.—License is issued upon payment of $2.00 to the county auditor (8451), besides $1.00 for recording the marriage certificate (8446), the total fee being $3.00 (4105), which is paid into the county treasury each month (4211), county officers receiving a salary in full compensation for all services (4210).

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—No consent shall be given or license issued unless the female be over fifteen years (8451). [There is no statutory minimum for males.—G.M.] *Penalty.* See 2268 and 2269 under 1k. [As to penalty for solemnizing such marriage, see 2671 under 2g.] The marriage of a party incapable of consenting thereto for want of legal age is voidable, but only at the suit of the party under the disability (8449). *Though it has been held, probably because of confusion with the age requirements for parental consent, that the marriage of a*

girl of eighteen years (2) or of a boy of sixteen is voidable, though not void (3), it seems now settled that the statute as to annulment refers to the common law ages of consent (4, 5) and that the marriage of persons over fourteen if male or twelve if female is not voidable even if not consummated (6), regardless of a higher age of consent in case of rape (4) or in the requirement for parental consent (5). The right to annulment being personal to the nonaged party, a parent cannot bring action to annul the child's marriage (4).

g. Parental Consent.—Marriage may be entered into by capable males of twenty-one and females of eighteen years (8437), the county auditor requiring an affidavit of some disinterested credible person establishing such ages, but license may be granted under such ages (if the female is over fifteen) if the consent in writing is obtained of the parent or guardian (8451). *Penalty.* Any person knowingly violating §8451 is punishable by fine not exceeding $1000, imprisonment not exceeding three years, or both (8452). [Note: Every person who takes a female under eighteen years without parental consent for the purpose of marriage shall be punished by imprisonment not exceeding ten years, fine not exceeding $1000, or both (2439).] *In absence of a statute expressly so declaring, want of parental consent does not avoid the marriage of a person over the common law age of consent (5, 6), notwithstanding even fraud in forging a certificate of parental consent (4).*

h. Mental and Physical Qualifications.—No woman under forty-five years or man of any age, unless marrying a woman over forty-five, shall marry or intermarry within this state who is a common drunkard, habitual criminal, epileptic, imbecile, feeble-minded, idiot, or insane person, or who has heretofore been afflicted with hereditary insanity or is afflicted with pulmonary tuberculosis in its advanced stages or with any contagious venereal disease (8439), the county auditor requiring before license issuance an affidavit, sworn to before any person authorized to administer oaths, of the male applicant showing that he is not afflicted with any contagious venereal disease, an affidavit of some disinterested credible person that neither party is a habitual criminal, and an affidavit of each applicant that he is not within the other named conditions (8451). *Penalties.* Anyone knowingly swearing falsely to statements in the affidavits is guilty of perjury (8451), punishable in the first degree by imprisonment not exceeding fifteen years (2351) and in the second degree not exceeding five years in the penitentiary or one year in the county jail (2353). Any person knowingly violating §8439 or §8451

is punishable by fine not exceeding $1000, imprisonment not exceeding three years, or both (8452). [As to prohibition of solemnization see 8440, 8452, and 2671 under 2g.]

The marriage of a person incapable of assenting thereto for want of sufficient understanding is voidable, but only at the suit of the party under the disability (8449). *Incapacity to understand the nature of the contract or the obligations assumed by marriage warrants annulment on suit of the incapable party if there was no ratification after restoration of competency* (7).

i. Form of License.—The license authorizes the officiant to join in marriage the persons named (8450).

j. Record of License.—Before delivering the license the issuer shall enter in his marriage record a memorandum of the names of the parties and of the affiant, the consent of parents or guardian if any, the substance of the affidavit, and the date of license (8453). *Penalty.* See 2268 under 1k.

k. Other Provisions.—*Penalties.* A public officer wilfully neglecting to perform a duty enjoined upon him by law (2268), or any person performing an act prohibited by statute, is guilty of a misdemeanor (2269), punishable by imprisonment for not more than ninety days or fine of not more than $250 (2266). [As to affidavit that neither party is a habitual criminal, see 8451 and penalties under 1h.]

2. SOLEMNIZATION

a. Officiant.—Marriages may be solemnized by judges of the supreme and superior courts and regularly licensed or ordained ministers or priests anywhere within the state, by justices of the peace within their respective counties (8441), and by any religious organization according to the established form practiced therein (8448).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—The officiant is authorized to join in marriage the persons named in the license (8450) and to retain the license (8453). *Penalty.* See 8454 under 2f and 2g.

d. Form of Ceremony.—No particular form is required except that the parties shall assent and declare in the presence of the officiant and of at least two attending witnesses that they take each other as husband and wife (8443). Marriages solemnized before any religious

organization according to its established ritual are valid (8448). *Penalty.* See 8454 under 2g. *Though the form of ceremony is immaterial (8), the mere purchase of an Indian woman from her family and cohabitation with her cannot constitute marriage (9). For a marriage to be recognized as valid if valid according to Indian customs, the Indian tribe must be a sovereignty regulating its own domestic relations (10).*

e. Common Law Marriage.—No statutory provision. *As a matter of public policy common law marriages are not recognized as valid in Washington (9, 10, 11, 12). Even where common law marriages are recognized as valid, they cannot be created by cohabitation only (13, 14).* [*Note: In all cases, of course, whether common law marriages are recognized or not, cohabitation and reputation as husband and wife raise a rebuttable presumption of a valid marriage having been contracted (11 and numerous later decisions).*]

Where common law marriages are valid, if one person marries not knowing the other to be under a disability, continued cohabitation as husband and wife after removal of the impediment may constitute marriage (15). But not so where the relation was known to the parties originally to be meretricious and ignorance of removal of the impediment precludes any possible change in the meretricious intent (14).

f. Irregular Solemnization.—The validity of a marriage solemnized before any person professing to be an authorized officiant shall not be affected by any want of authority in such person if the marriage was consummated with the belief of the parties, or either of them, that they were lawfully married (8442). *A ceremony in words of present consent before an Indian chief, a Christian, who assumed to be a minister and to have authority to solemnize marriages, so believed by the parties who consummated their relation in such belief, would constitute marriage (8). Penalty.* Any person undertaking to join others in marriage knowing that he is not lawfully authorized to do so shall be punished by fine of from $100 to $500 (8454).

g. Other Provisions.—No authorized officiant shall knowingly perform a ceremony uniting in marriage persons either of whom is an epileptic, imbecile, feeble-minded, idiot, or insane person, a common drunkard, habitual criminal, or person who has theretofore been afflicted with hereditary insanity or is afflicted with pulmonary tuberculosis in its advanced stages or any contagious venereal disease, unless the female party is over forty-five years (8440). *Penalties.* Any person knowingly violating §8440 is punishable by fine not exceeding $1000, imprisonment not exceeding three years, or both

(8452). Every person who solemnizes a marriage knowing either party to be under the age of legal consent, to be an idiot or insane person, habitual criminal or common drunkard, or knowing any legal impediment to exist, is guilty of a gross misdemeanor (2671), punishable by imprisonment not exceeding one year, fine not exceeding $1000, or both (2267). Anyone joining persons in marriage contrary to the provisions of this chapter on marriage is punishable by fine of from $100 to $500 (8454).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant shall give to each of the parties, if required, a certificate specifying the names and residence of the parties and of at least two witnesses, the time and place of marriage, the date of the license and by whom issued (8444), and within thirty days shall deliver to the county clerk of the county where the marriage took place a certificate containing the same particulars (8445, as amended S.L. 1927, ch. 172). A certificate shall be similarly filed by the person presiding in or recording the proceedings of a religious organization which solemnizes a marriage according to its ritual (8448). *Penalty.* Any officiant neglecting to deliver the certificate to the county clerk within the specified time shall be fined from $25 to $300 (8447).

b. Local Record.—The county clerk shall file the officiant's certificate in the record of marriages (8446). There shall be kept in the office of the clerk of the superior court a record in which certificates of all marriages solemnized in the county shall be recorded (1372). [Note: The county clerk is clerk of the superior court (73).] Where the marriage takes place in a county other than where the license was issued, the county clerk where the marriage certificate is filed shall send a certified copy thereof to the county clerk of the county of issuance who shall record such certificate (8445, as amended S.L. 1927, ch. 172). [Note: In case of lost or destroyed marriage records the superior or probate court may take evidence for their restoration (1276).]

c. State Record.—The county auditor shall keep a book known as the marriage statistic book in which shall be recorded all the statistical information prescribed by the State Board of Health and shall be required to enter quarterly a full report of all marriage statistics to the secretary of the board (6017). [This section enacted in 1897 has not been expressly repealed nor is it in direct conflict with the

law of 1907 (Statutes, 6018 ff.), providing for the registration of births and deaths and not mentioning marriages, but inasmuch as the law of 1907 provides a complete act on this subject it probably supersedes and impliedly repeals the foregoing section, according to the compiler of the Compiled Statutes.—G.M.]

d. Evidence.—Copies of all records on file in offices of this state, certified by the officer having custody thereof, shall be evidence (1257). *For copies of records of marriages in other states to be admissible they must be certified and authenticated as required by the federal statute* (*16*). In cases of incest, bigamy, and adultery a recorded certificate of marriage or a certified copy thereof proves the marriage (2153). In case of family desertion no other evidence is required to prove the marriage than in a civil action (6912).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (8438, as amended S.L. 1927, ch. 189). *Marriage within the prohibited degrees is void and may be annulled by either party though the applicant entered it wilfully* (*17*). *There is some question as to whether the marriage of first cousins, though void if contracted here, is so contrary to natural law as not to be recognized here no matter where contracted* (*17, 18*). *Penalty.* Persons nearer of kin than second cousins having sexual intercourse shall be imprisoned for not more than ten years (2455). *This statute repeals the criminal provision in the marriage statute as to incest* (*§8438*) *and makes the offense applicable only to relatives by blood and not by affinity* (*19*).

b. Proper Civil and Racial Status.—No provision.

c. Proper Legal Status.—Marriages are prohibited when either party has a spouse living at the time (8438, as amended S.L. 1927, ch. 189), and every person who, having a spouse living, shall marry another person, or shall continue to cohabit with such second spouse in this state, shall be imprisoned for not more than five years, unless the former spouse has been absent for five years exclusively then last past without being known to the person marrying again to be living within that time and believed dead, or unless the former marriage has been pronounced void, annulled, or dissolved (2453). *The marriage of a person already married is void* (*14, 15*) *absolutely, though a decree of nullity may be granted to settle doubt as to facts* (*20*). *A woman marrying in good faith without knowledge of the man's prior*

subsisting marriage may obtain annulment and an equitable distribution of property mutually acquired during the relationship (21, 22).

Although a decree for divorce may not become absolute until six months after the interlocutory decree is entered, upon becoming absolute it is a complete dissolution of the marriage as to both parties (988, 988–1, 990). *Under former statutes though marriage was completely dissolved by the divorce decree, remarriage was forbidden within a period of six months thereafter and any such marriage was void (12, 23) even if contracted outside the state (24, 25, 26, 27, 28). A person marrying within the forbidden period is not precluded from annulment, no matter how undeserving he may be, because of the public policy against such unions (29).*

d. Proper Consent of Parties.—Marriage is a civil contract (8437). *A marriage contracted for the sole purpose of legitimating an unborn child, with an agreement not to cohabit, is not dissoluble because the child miscarried (30).* When either party shall be incapable of consent thereto or when the consent shall be obtained by force or fraud, such marriage is voidable but only at the suit of the disabled or injured party (8449). Divorce may be granted when the consent of the party applying was obtained by force or fraud and there has been no subsequent voluntary cohabitation (982). *Less evidence suffices to annul a marriage for mental incompetency if it was induced by fraud (7). [Note: A woman marrying a married man upon his representation that he is unmarried may collect damages in a tort action for deceit (31).] The duress necessary for annulment must be clearly established, for where one is under a "moral obligation" to marry, as in case of pregnancy, the presumption is that one married to fulfill such obligation (32). A marriage contracted to procure release from a lawful prosecution, not maliciously instigated without probable cause, is not subject to annulment for duress (32). Penalty.* Every person compelling a woman against her will to marry him or any other person is punishable by imprisonment not exceeding twenty years, fine not exceeding $1000, or both (2438). [Note: Taking a woman against her will with intent to compel her marriage is punishable by imprisonment not exceeding ten years, fine not exceeding $1000, or both (2439).]

5. STATE SUPERVISION

No provision. [See 6017 and comment under 3c.]

6. INTERSTATE RELATIONS

No statutory provision. *The law of the place of contract governs the validity of marriage (15), and a marriage valid where contracted is valid everywhere (24) if the place of contract is actually a sovereignty (10). Certain marriages are so contrary to natural law as not to be recognized as valid here even if valid where contracted (17, 18). A statute forbidding certain marriages to be contracted outside the state applies only to persons domiciled in the state intending to evade its laws by contracting a marriage elsewhere (24, 25, 27) and not to an innocent party not intending evasion (26, 28).*

7. SEX OFFENSES AND MARRIAGE

A defendant in a seduction prosecution who marries the female before judgment shall have all further proceedings stayed unless he wrongfully abandon such wife within three years (2441).

WASHINGTON CASES

1. Weatherall v. Weatherall, 63 W. 526 (1911). **2.** Arey v. Arey, 22 W. 261 (1900). **3.** State v. McPherson, 72 W. 371 (1913). **4.** In re Hollopeter, 52 W. 41 (1909). **5.** Cushman v. Cushman, 80 W. 615 (1914). **6.** Tisdale v. Tisdale, 121 W. 138 (1922). **7.** Waughop v. Waughop, 82 W. 69 (1914). **8.** Weatherall v. Weatherall, 56 W. 344 (1909). **9.** Kelley v. Kitsap County, 5 W. 521 (1893). **10.** In re Wilbur's Estate, 8 W. 35 (1894); 14 W. 242 (1896). **11.** In re McLaughlin's Estate, 4 W. 570 (1892). **12.** In re Smith's Estate, 4 W. 702 (1892). **13.** Stans v. Baitey, 9 W. 115 (1894). **14.** Blodgett v. Blodgett, 109 W. 597 (1920). **15.** Willey v. Willey, 22 W. 115 (1900). **16.** State v. Kniffen, 44 W. 485 (1906).

17. Johnson v. Johnson, 57 W. 89 (1910). **18.** State v. Nakashima, 62 W. 686 (1911). **19.** State v. Bielman, 86 W. 460 (1915). **20.** Beyerle v. Bartsch, 111 W. 287 (1920). **21.** Buckley v. Buckley, 50 W. 213 (1908). **22.** Powers v. Powers, 117 W. 248 (1921). **23.** In re Brenchley's Estate, 96 W. 223 (1917). **24.** State v. Fenn, 47 W. 561 (1907). **25.** Pierce v. Pierce, 58 W. 622 (1910). **26.** Sortore v. Sortore, 70 W. 410 (1912). **27.** Peerless Pacific Co., v. Burckhard, 90 W. 221 (1916). **28.** Knoll v. Knoll, 104 W. 110 (1918). **29.** Hahn v. Hahn, 104 W. 227 (1918). **30.** Turner v. Turner, 82 W. 518 (1914). **31.** Larson v. McMillan, 99 W. 626 (1918). **32.** Thorne v. Farrar, 57 W. 441 (1910).

WEST VIRGINIA

REFERENCES: West Virginia Code (Barnes), 1923; Barnes' West Virginia Statutes, 1925; Acts of West Virginia, 1927; Reports through Volume 102.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to chapters and sections of the Code itself. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this West Virginia section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Every marriage in this state shall be under license (ch. 63, §6). *A marriage contracted in this state without a license is void (1).* [Note: No marriage solemnized in this state between 1861 and 1865 shall be void because solemnized without a license (ch. 63, §6).]

b. Issuer.—Every license for a marriage shall be issued by the clerk of the county court of the county in which the female usually resides (ch. 63, §1).

c. Compensation of Issuer.—For all services connected with license issuance and recording the clerk of the county court collects $2.00 (ch. 137, §7), $1.00 of which he pays into the county treasury (ch. 137, §34) and $1.00 to the state treasury for state registration (ch. 150, §280), all clerks of courts receiving a salary (ch. 137, §44).

d. Personal Appearance by Candidates.—No specific provision. [But see ch. 63, §14, under 1k.]

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—[No provision as condition to license issuance.] The age of consent of the male shall be eighteen and of the female sixteen years (ch. 64, §2). A marriage solemnized in this state when either party was under the age of consent shall be void from the time it is so declared in a decree of divorce or nullity (ch. 64, §1). *The statute only raises the common law ages of consent and does not change*

the rule that marriages below such ages are voidable merely, not void (2). [Note: The estate of a female marrying without parental consent between the ages of twelve and fourteen shall be committed to a receiver (ch. 63, §12).]

g. Parental Consent.—If any person intending marriage be under twenty-one years and not previously married, the consent of the father or guardian or, if there be none, of the mother, shall be given either personally to the clerk of the county court or in writing subscribed by a witness who shall make oath before the clerk that such parent or guardian signed or acknowledged the writing in his presence (ch. 63, §2).

h. Mental and Physical Qualifications.—[No provision as condition to license issuance.] Marriages solemnized when either party was insane or incapable from physical causes of entering into the marriage state shall be void from the time they are so declared by a decree of divorce or nullity (ch. 64, §1). *The marriage of persons mentally incapable is voidable only and may not be attacked after the death of a party thereto (3).*

i. Form of License.—The license, signed by the clerk and addressed to any licensed officiant, authorizes the matrimonial union of the parties named, according to the laws of the state and the rites of the church (ch. 63, §14).

j. Record of License.—The clerk of the county court at the time of issuing the license shall make a complete record of all matters required to be ascertained (ch. 63, §§1, 14). *Penalty.* See ch. 149, §4, under 1k.

k. Other Provisions.—Before issuing the license the clerk of the county court must ascertain as near as may be of the party obtaining it the full name of each party, his age, birthplace, and residence (ch. 63, §14). *Penalty.* If any clerk of a county court knowingly issue a marriage license contrary to law, he shall be confined in jail not exceeding one year, fined not exceeding $500, or both (ch. 149, §4).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by a properly authorized minister of the gospel and by no other person (ch. 63, §3), except that marriage between persons belonging to a religious society having no licensed minister may be solemnized as practiced in any such society (ch. 63, §5).

b. Officiant's Credentials.—The circuit or county court of any county, or clerk of any county court when neither court is in session, may make an order authorizing any person to celebrate marriage who shall produce proof that he is a duly licensed minister of the gospel in regular communion with the religious society and who shall give bond of $1500 (ch. 63, §3). *Penalty.* See ch. 149, §5, under 2f.

c. Presentation of License.—The license authorizes the marriage of the persons named (ch. 63, §14). *Penalty.* See ch. 149, §5, under 2f.

d. Form of Ceremony.—The license authorizes the officiant to solemnize marriage according to the rites and ceremonies of his church and the laws of the state (ch. 63, §14), and the marriage of members of any religious society having no licensed minister may be solemnized as prescribed and practiced in such society (ch. 63, §5).

e. Common Law Marriage.—Every marriage in this state shall be under a license and solemnized in the manner herein provided (ch. 63, §6). *The statute is mandatory and renders invalid all attempted marriages contracted in this state which have not been solemnized in substantial compliance with its provisions (1, 4). A cohabitation illicit in origin is presumed to continue so and cannot be transformed into matrimony by anything short of facts proving an actual contract of marriage (1).*

f. Irregular Solemnization.—The validity of a marriage, otherwise lawful, solemnized by any person professing to be authorized shall not be affected by any want of authority in such person if the marriage was consummated with the belief of the parties, or either of them, that they have been lawfully married (ch. 63, §6). *Penalty.* Any person who knowingly performs the ceremony of marriage without lawful license or without being legally authorized so to do shall be confined in jail not exceeding one year, fined not exceeding $500, or both (ch. 149, §5).

g. Other Provisions.—Any person who knowingly performs the ceremony of marriage between a white person and a Negro shall be fined not exceeding $200 (ch. 149, §9). [Note: The husband shall pay at least $1.00 to the officiant (ch. 63, §7).]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant within sixty days after the ceremony shall return the license to the office whence it issued with endorsement of the fact, time, and place of celebration (ch. 63,

§14). *Penalty.* If any minister shall fail to comply, the condition of his bond [see 2b] shall be deemed broken and he shall also be subject to penalty (ch. 63, §17). On or before the fifth day of each month the officiant shall return to the issuer the license with his endorsement thereon (ch. 150, §28o). [The time provision in ch. 150 may supersede the earlier provision in ch. 63.—G.M.] A certificate of the marriage of a resident of West Virginia celebrated outside the state, verified by an affidavit of a witness of the ceremony, may be returned to the clerk of the county court of the county in which the husband resides if he be the resident, otherwise of the county in which the wife resides, and an abstract thereof shall be recorded by such clerk (ch. 63, §16).

b. Local Record.—For the registration of marriages the county clerk of each county shall act as local registrar (ch. 150, §26).

c. State Record.—All marriages taking place within the state shall be registered with the State Registrar of Vital Statistics. Each month the county clerk of each county shall forward to the State Registrar a certified copy of all marriage records made by him, which the Registrar shall preserve and index (ch. 150, §28o). *Penalty.* A local registrar failing to carry out his required duties and the directions of the State Registrar shall be fined from $1.00 to $5.00 (ch. 150, §28q).

d. Evidence.—A certified copy of the state registrar's register of marriages is prima facie evidence in all courts (ch. 150, §28o). *A certified copy of a record of marriage from the books of the county court is admissible to show a person's age at the time of marriage* (*5*). All records of office books kept in any public office of a state shall be evidence if attested by the keeper of such records and properly certified and authenticated (ch. 130, §20). *Such foreign records are admissible if required to be kept by the law of the jurisdiction* (*6*). *The presumption, from cohabitation and reputation, of a legal marriage having been actually solemnized is rebutted by affidavits of county clerks of another state at the places of alleged solemnization and domicil, common law marriages not being valid there, that no marriage license had ever been issued to the parties* (*4*).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (ch. 63, §§9, 10, 11). [Note: Marriages contracted prior to 1917 with a brother's or uncle's widow, first or double cousin, are valid (ch. 63, §9).] Marriages pro-

hibited because of consanguinity or affinity are void from the time that they are so declared by a decree of divorce or nullity (ch. 64, §1). *Continuance of a marital relationship between a blood nephew and aunt being contrary to good morals and public policy, a decree of annulment will be granted even to a party who entered the relationship knowingly* (*7*). *Penalty.* Persons marrying in violation of these prohibitions shall be confined in jail not exceeding six months, fined not exceeding $500, or both, even if the marriage is evasively solemnized outside the state by residents of West Virginia (ch. 149, §3). [See 6.] *The crime of incest does not depend upon knowledge of the defendant that the relationship existed* (*8*).

b. Proper Civil and Racial Status.—All marriages solemnized in this state between a white person and a Negro shall be void from the time that they are so declared in a decree of divorce or nullity (ch. 64, §1). *Penalty.* A white person marrying a Negro shall be confined in jail not exceeding one year and fined not exceeding $100 (ch. 149, §8). [As to penalty for celebrating a miscegenetic marriage, see 2g.]

c. Proper Legal Status.—All marriages prohibited by law on account of either party's having a former spouse then living shall be void from the time that they are so declared by a decree of divorce or nullity (ch. 64, §1). *Prior to this statute the marriage of a person already married was void without legal process* (*9*). *Penalty.* Any person marrying another during the life of the former spouse by an existing marriage shall be imprisoned for from one to five years (ch. 149, §1). The foregoing section shall not extend to a person whose former spouse has been continually absent for the preceding seven years and not known to such person to be living within that time, or to a person divorced or whose marriage has been declared void (ch. 149, §2). *A marriage itself void because of an earlier existing marriage cannot be the basis of a prosecution for bigamy in contracting a third marriage* (*6*).

Neither party to a divorce shall marry any other person within six months from the decree, and the court may further prohibit the guilty party from marrying within a certain time not to exceed five years; any marriage—except remarriage of the parties—contracted within the prohibited period shall be void and the parties criminally liable as if no divorce had been granted (ch. 64, §14). *Though the legislature can lawfully authorize the prohibition of remarriage of the guilty party and make remarriage criminal* (*10*), *beyond the authority granted in a statute a court has no authority to impose restrictions upon*

remarriage (11). The statute provides no restraint upon the remarriage of the innocent party to a divorce beyond a period of six months (11).

d. Proper Consent of Parties.—*Mutual consent and bona fide agreement freely given with intention of entering into a valid status of marriage are elements essential to the validity of marriage, and a marriage ceremony gone through in jest without such consent and intention is subject to annulment (12, 13).* [Note: *Penalty.* Any person taking a female against her will with intent to marry her, or to cause her marriage to another, shall be imprisoned from three to ten years (ch. 144, §16).]

5. STATE SUPERVISION

The State Department of Health shall have charge of the registration of marriages, shall prepare all necessary instructions and forms for obtaining and preserving the state records, and shall procure faithful local registration (ch. 150, §23). The State Registrar of Vital Statistics is charged with the execution of the provisions for registration, supervises local registrars, has authority to investigate irregularities and report them to the prosecuting attorney of the county for action (ch. 150, §29), and may remove local sub-registrars for neglect of duty (ch. 150, §26).

6. INTERSTATE RELATIONS

Generally the law of the place of contract governs the matrimonial capacity of the parties as well as the form of solemnization (3), and a marriage valid where contracted is valid in this state though not entered into according to our laws (14). If residents of this state, intending to return and reside here, in order to evade the law go to another jurisdiction and there intermarry in violation of ch. 64, §1, and afterwards return and reside here as man and wife, such marriage shall be governed by the same law as if solemnized in this state (ch. 64, §3). [The section referred to makes subject to divorce or declaration of nullity all marriages which are miscegenetic or polygamous, between persons related within the prohibited degrees, or of persons mentally deranged, physically incapable, or under the age of consent. See *supra.*]

7. SEX OFFENSES AND MARRIAGE

Marriage is not a defense to the charge of procuring a female for a house of prostitution (ch. 144, §16b–4).

WEST VIRGINIA CASES

1. Beverlin v. Beverlin, 29 W.V. 732 (1887). **2.** Perkey v. Perkey, 87 W.V. 656 (1921). **3.** Hastings v. Douglass, 249 Fed. 378 (1918). **4.** In the matter of Meade's Estate, 82 W.V. 650 (1918). **5.** Blair v. Sayre, 29 W.V. 604 (1887). **6.** State v. Goodrich, 14 W. V. 834 (1878). **7.** Martin v. Martin, 54 W.V. 301 (1903). **8.** State v. Pennington, 41 W.V. 599 (1896). **9.** Stewart v. Vandervort, 34 W. V. 524 (1890). **10.** State v. Snyder, 89 W.V. 96 (1921). **11.** Underwood v. Underwood, 83 W.V. 272 (1919). **12.** Crouch v. Wartenberg, 86 W.V. 664 (1920); 91 W.V. 91 (1922). **13.** Meredith v. Shakespeare, 96 W.V. 229 (1924). **14.** Miller v. Miller, 76 W.V. 352 (1915).

WISCONSIN

REFERENCES: Wisconsin Statutes (two volumes), 1925; Wisconsin Session Laws, 1927; Reports through Volume 189.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to the sections of the Statutes and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Wisconsin section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—No persons shall be joined in marriage until a license shall have been obtained for that purpose (245.13). Marriage may be validly contracted only after a license has been issued therefor (245.12). All marriages contracted after 1917 in violation of §245.12 shall be null and void (245.32). *Prior to this statute a license was not essential to the validity of a marriage (1).* [Note: Where marriage has been properly celebrated and the parties have lived as man and wife uninterruptedly for one year or until the death of either of them, it shall be deemed that a license has been issued as required (245.34).]

b. Issuer.—License is obtained from the county clerk of the county in which one of the parties resides; if both are non-residents of the state, from the county clerk of the county where the ceremony is to be performed (245.13).

c. Compensation of Issuer.—Each county clerk shall receive as a fee for each license 50 cents, which shall become part of the funds of the county (245.38). The county board shall fix the annual salary for each county officer which shall be in lieu of all fees (59.15).

d. Personal Appearance by Candidates.—No license shall be issued unless both the parties shall be identified to the satisfaction of the proper county clerk, or the parties separately or together may appear before an officer authorized to administer oaths in the county (in this or any other state) wherein either of the parties resides or

where the marriage is to be performed and make the required statement under oath to be forwarded to the proper county clerk (245.15). [As to substance of statement, see 245.15 under 1k.] *Penalty.* See 245.19 under 1k. [The Attorney General has held that both parties need not appear before the same officer (10 O.A.G. 533).—G.M.]

e. Advance Notice and Objections.—Application shall be made at least five days before the license is issued. Upon application of either party and proof that either is dangerously ill or that the female is pregnant, or upon request of the parent or guardian of the female, any court of record may authorize the issuance of a license before the expiration of five days. The person making such application must have been a resident of the state for at least thirty days theretofore (245.14). [The Attorney General has held that the judge may make exceptions only as allowed by statute (12 O.A.G. 80).—G.M.]

The county clerk shall post in his office a notice of the application. Any parent, grandparent, brother, sister, or guardian of either applicant may file objections under oath with the probate court; and if upon hearing the court finds the application wilfully false or insufficient or either party legally incompetent to marry, it shall make an order refusing the license, unless the falseness or insufficiency is due merely to inadvertence, in which case the court shall permit an amendment of the application, or unless the required information cannot be obtained, in which case the court may order the license to issue notwithstanding such insufficiency. The costs rest in the discretion of the court (245.17). *Penalty.* See 245.19 under 1k.

f. Minimum Age.—Males of eighteen and females of fifteen years are capable of contracting marriage (245.02), and no license shall be issued if either of the parties be under the marriageable age of consent (245.16). *Penalties.* See 245.19 under 1k and 245.18 under 1g. [As to penalty on officiant, see 245.26 under 2g.] Marriage may be annulled on suit of the husband if under eighteen or of the wife if under fifteen years at the time of marriage, unless confirmed after attaining such age (247.02). *The statute fixing the ages of capability, though not expressly declaring the incapability of persons below such ages, does abrogate the common law rule as to ages of consent (2), and under its provisions the marriage of a person between the ecclesiastical law age of seven and the statutory age of consent is not void but voidable only (3) by court decree, in absence of which a subsequent marriage will be bigamous (4). The nonaged party need not wait till attaining the required age before bringing action for annulment; he may dissent within*

his nonage (2). Not all cohabitation precludes annulment (2); unless there has been cohabitation or other confirmation after attaining the age of consent annulment for nonage is a matter of right and must be granted (3). An infant incapable from want of age to contract marriage is incapable also to estop himself, by fraudulent declaration of his age, to assert the invalidity of the marriage in an annulment action (3, 5).

g. Parental Consent.—For the marriage of males under twenty-one and females under eighteen years no license shall be issued without the consent of the parents, parent having actual care of the minor, or guardian, given personally before the county clerk under oath or verified by affidavit before a notary public and filed by the clerk; if there be no parent or guardian the judge of probate in the county where the application is pending may make an order after hearing allowing the marriage (245.16). *Penalties.* [See 245.19 under 1k.] Any person wilfully swearing falsely in such affidavit, or procuring another to swear falsely, as to the age of a minor, or falsely personating a parent or guardian, is punishable by a fine of from $100 to $500, imprisonment not exceeding one year, or both (245.18). [As to penalty on officiant, see 245.26 under 2g.] *The requirement for parental consent has no effect upon the marriage of residents of this state validly contracted in another state (6).*

h. Mental and Physical Qualifications.—Males within fifteen days prior to applying for marriage license shall be examined for any venereal disease, and it shall be unlawful for the county clerk to issue a license to any person who fails to file a certificate from a physician licensed to practice in this or in the state of the male party's residence setting forth his freedom from venereal diseases so nearly as can be determined by thorough examination and by tests when necessary (245.10). [The Attorney General has held that an osteopath may make the examination but not a chiropractor (12 O.A.G. 520).—G.M.] *Penalty.* Any clerk who unlawfully issues a license to a person failing to file the certificate, any physician knowingly making a false statement in such certificate, or any person who shall disclose any matter relating to the examination except as required by law, is punishable by a fine not exceeding $100 or imprisonment not exceeding six months (245.10). *This statute, a reasonable regulation of marriage in the interest of public well-being, is not discriminatory in classification though applicable only to men and is not unconstitutional (7). Any recognized test for venereal disease may satisfy the statutory requirement; the Wassermann is not essential (7).* No persons who have ever been afflicted with gonorrhea or syphilis shall be granted

a license until they shall furnish a certificate from a designated state laboratory that they are not in a communicable stage of either disease (245.11). *Penalty.* Any person obtaining a license contrary to the provisions of this section is punishable by fine of not less than $100, imprisonment for not less than three months, or both (245.11). *The requirements for antenuptial physical examination are applicable only to applicants for license to marry within this state, have no extra-territorial effect, and do not create in residents of this state a disability following them elsewhere (6).*

No insane person, epileptic, or idiot shall be capable of contracting marriage (245.03). No person shall marry who is insane, mentally imbecile, feeble-minded, or epileptic (351.44). *Penalty.* Any sane person violating the provisions of §351.44 is punishable by fine of from $50 to $150, imprisonment not exceeding six months, or both (351.45). [As to penalty on officiant, see 351.44 and 351.45 under 2g.] Marriage may be annulled for insanity, idiocy, or such want of understanding existing at the time of marriage as renders assent to marriage impossible, at suit of either party or of the guardian, if there be no confirmation of the marriage after regaining reason (247.02). *The test of mental incompetency warranting annulment is not whether a person mentally measures up to the responsibilities of matrimony and parenthood but whether the want of understanding renders him incapable of assenting to a civil contract, which marriage is defined to be (8, 9, 10). Adjudication of incompetency to manage one's estate and appointment of a guardian (9) or eccentric conduct later ripening into dementia praecox do not show incapacity to marry (10). Though epilepsy is cause for annulment of marriage (11), it does not itself render the marriage void, at least where not combined with insanity, so as to defeat a claim in an estate by the innocent party to the marriage (12). [As to concealment or misrepresentation of venereal disease or antenuptial pregnancy or unchastity constituting fraud warranting annulment, see* 4d.]

i. Form of License.—The license, directed to any person legally authorized to solemnize marriage or, if the marriage is to be solemnized by the parties without an officiant, directed to the parties, and authorizing the joinder in marriage according to the laws of this state, shall show the names, ages, and domestic condition of the parties, including the number of previous marriages and manner of dissolution, and parental consent if required, and shall state that the ceremony may be performed within thirty days from the date of the license and that the license shall not be deemed to dispense with any legal disability rendering the marriage illegal (245.21 and 245.22).

j. Record of License.—The county clerk shall enter in a docket open to public inspection a complete record of the applications for and the issuing of all marriage licenses and all other matters which the law requires him to ascertain (245.20). [As to filing of parental consent, see 245.16 under 1g.] *Penalty.* Any county clerk failing immediately to enter applications and licenses or preventing anyone from making a copy of the entries shall be fined for each offense not exceeding $50 (245.30).

k. Other Provisions.—The county clerk shall require of the parties, either separately or together, a statement under oath as to the legality of the contemplated marriage, and its date; the names, relationship if any, age, nationality, color, residence, and occupation of the parties, the names of the parents or guardians of such as are under the age of legal majority, any prior marriage and the manner of dissolution thereof, and if there be no legal objection the clerk shall issue the marriage license. So too if he be satisfied upon receipt of the statement of the parties sworn before a proper officer (245.15). [See 245.15 under 1d.] [The Attorney General has held that the fact of a party's having been divorced within a year prior to application [see 245.03 under 4c] is no cause to refuse a license if the decree was granted in another state where remarriage is not prohibited (2 O.A.G. 545; 13 O.A.G. 564).—G.M.] *Penalties.* Any county clerk knowingly issuing a marriage license in violation of the provisions of §§245.12 to 245.38 is punishable by a fine of from $100 to $500, imprisonment not exceeding one year, or both (245.19). Any person wilfully and falsely swearing or procuring another to swear falsely in regard to any material fact as to the competency of either or both of the parties is punishable by a fine of from $100 to $500, imprisonment not exceeding one year, or both (245.18).

2. SOLEMNIZATION

a. Officiant.—Marriage may be solemnized by any justice of the peace, police justice, municipal judge or court commissioner in the county in which he is elected or appointed, and throughout the state by any judge of a court of record; by any ordained minister or priest in regular communion with any religious society (245.05), or by any licentiate of a denominational body or an appointee of any bishop while serving as the regular minister or priest, provided he is not restrained from solemnizing marriage by the discipline of his denomination (245.06); or in accordance with the customs of any religious society to which either party may belong (245.12). [The

Attorney General has held that a minister, if ordained and in regular communion, need not be in charge of any particular parish or congregation (4 O.A.G. 978).—G.M.]

b. Officiant's Credentials.—Ministers or priests before being authorized to solemnize marriages shall file a copy of their credentials of ordination or other proof of official character with the clerk of the circuit court of some county, who shall make record and give a certificate thereof, the place of such record being indorsed upon each certificate of marriage granted by any minister or priest (245.08). A licentiate or appointee of a bishop [see 2a] must file credentials with such clerk of the county where his church is located (245.07). *Penalty.* See 245.28 under 2f. *Failure of the minister to record his credentials, though exposing him to penalty, does not affect the validity of a marriage solemnized by him* (*13*).

c. Presentation of License.—The license authorizes any officiant to solemnize the marriage (245.21). *Penalty.* An officiant solemnizing a marriage unless parties have obtained a license is punishable by a fine of from $100 to $500, imprisonment not exceeding one year, or both (245.26).

d. Form of Ceremony.—Marriage may be validly contracted before an authorized officiant by the parties declaring in the presence of at least two competent witnesses that they take each other as husband and wife, or in accordance with the customs of any religious society to which either party belongs by a similar declaration before at least two witnesses (245.12). *Penalties.* An officiant, or the parties if there be no officiant, violating these requirements shall be punishable by a fine of from $100 to $500, imprisonment not exceeding one year, or both (245.26 and 245.27).

e. Common Law Marriage.—Marriage may be validly contracted only after issuance of a license and solemnization as required (245.12). [See 245.12 under 2d.] *Prior to the enactment of this statute in 1917 a valid marriage could be created by present agreement followed by cohabitation and corroborated by reputation* (*14*). [But the Attorney General has held that this statute abolishes common law marriages (7 O.A.G. 525).—G.M.]

A marriage between a person already married and a person who marries in good faith not knowing of the other's existing marriage shall be valid from and after the removal of the impediment by death or divorce of the other party to the former marriage if they continue to cohabit in good faith on the part of one of them (245.35).

Prior to the enactment of this statute the court had uniformly held that mere continuance of cohabitation would not create a valid marriage without an actual contract of marriage being shown after removal of the impediment (15, 16, 17). A relation originally illicit was presumed to continue so in absence of proof of a subsequent actual contract of marriage (18).

f. Irregular Solemnization.—No marriage shall be void because of want of authority in the officiant if otherwise lawful and consummated with the belief of the parties or either of them that they were lawfully married (245.33). *Where the parties cohabit and recognize each other as husband and wife, the fact that the officiant at their marriage ceremony had not recorded his credentials* [see 2b] *does not affect the validity of their marriage (13).* No marriage shall be void because of the license having been issued without the consent of parents or guardian of a minor or by a county clerk not having jurisdiction, because of any irregularity of form in the application or license, because of the incompetency of witnesses, or because the marriage was solemnized in the wrong county or more than thirty days after the date of license, if the marriage was in other respects lawful and consummated with the belief of the parties or either of them that they have been lawfully married (245.34). *Penalty.* Any person not duly authorized who wilfully undertakes to solemnize a marriage, or any person who aids in a fictitious marriage, is punishable by a fine of from $100 to $1000, imprisonment not exceeding one year, or both (245.28).

g. Other Provisions.—The officiant shall satisfy himself that the parties presenting themselves are the parties named in the license, and if he knows of any legal impediment he shall refuse to perform the ceremony (245.21). *Penalties.* For solemnizing a marriage knowing any legal impediment, or unless parental consent when required is stated in the license, or more than thirty days after the date of license, or in case of non-residents of the state in a county other than where the license was issued, the officiant is punishable by a fine of from $100 to $500, imprisonment not exceeding one year, or both (245.26). The contracting parties solemnizing a marriage without the presence of an officiant more than thirty days after the date of license or, if nonresidents of the state, in a county other than where the license was issued, are punishable by a fine of from $100 to $500, imprisonment not exceeding one year, or both (245.27). Any officiant who unites in marriage a person insane, mentally imbecile, feeble-minded, or epileptic, or anyone who assists in procuring

such a marriage, is punishable by a fine of from $50 to $150, imprisonment not exceeding six months, or both (351.44 and 351.45).

3. THE MARRIAGE RECORD

a. Marriage Certificates.—Two copies of the marriage certificate are given to the parties and the original is returned within three days after the marriage by the officiant, or by the parties when there is no officiant, to the local registrar of vital statistics of the city or town in which the marriage was performed, the marriage license being retained by the officiant as evidence of authority to perform the ceremony (245.25, as amended L. 1927, ch. 222). The blank form for the certificate shall contain the information required to be obtained by the license issuer [see 245.15 under 1k], together with the birthplace of the parties and names of parents and such other statistical data as the registrar of vital statistics shall prescribe, and shall state the requirement for return and penalty for non-compliance (245.24, as amended L. 1927, ch. 222). Residents of Wisconsin going to another state to be married and returning shall file with the local registrar of vital statistics of the city or town of their residence within ten days after their return a certificate of marriage on a blank obtained from the clerk of the county where either resided prior to marriage (69.48). *Penalties.* Officiants or parties failing to transmit a certificate to the local registrar within three days shall be fined not to exceed $200 (245.29, as amended L. 1927, ch. 222). Officiants, or where there is no officiant the parties, falsely certifying the date of marriage, are punishable by fine of from $100 to $500, imprisonment not exceeding one year, or both (245.26 and 245.27).

b. Local Record.—The local registrar of vital statistics—who is the health officer in cities and the clerk of towns and villages (69.05) —shall collect marriage certificates (69.13), and preserve a complete copy of each (69.23). The local registrar each month shall transmit copies of certificates of marriages performed within his jurisdiction between parties either of whom was not a resident thereof to the local registrar of the city or town of their residence, who shall record them (69.58). The local registrar each month shall transmit a copy of each marriage certificate received to the register of deeds of his county (69.55), who shall file and index them (69.56). *Penalty.* Any person whose duty it is to certify a marriage to the register of deeds failing to do so or knowingly making false return, and any register of deeds failing to record the required certificate or wilfully making a false record, is punishable by imprisonment not exceeding six months

or fine not exceeding $100 (348.35). [Note: When registration is not made the record may be supplied by the affidavit of the officiant or some witness to the ceremony (69.57). The circuit court of the county where a marriage is received may make an order correcting such record (69.59). Local registrars shall see that the requirements as to registration are complied with (69.18).]

c. State Record.—The local registrar shall transmit monthly to the State Registrar of Vital Statistics all original certificates received by him, or the duplicates in cities of the first class (69.24), or shall report the fact that no marriages occurred (69.25), and the state registrar shall preserve the certificates and keep an index (69.07).

d. Evidence.—A certified copy of a marriage record of the state registrar, register of deeds, or local registrar shall be prima facie evidence of the facts therein (69.11). Official certificates of marriages issued in foreign countries, properly authenticated, and the marriage records of a church, parish, or officiant, supported by oath of their custodian, are presumptive evidence of the facts stated (328.09).

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477 (245.03). Marriage may be contracted between first cousins where the female has attained the age of fifty years (245.03). Marriage of persons nearer of kin than second cousins by the half or whole blood may be annulled by either party during the lifetime of both (247.02). [The Attorney General has held that the marriage of first cousins is absolutely void (5 O.A.G. 227) and that the marriage of a man with the daughter of his first cousin is within the prohibited degrees (12 O.A.G. 12).—G.M.] *Penalty.* Persons marrying within the degrees prohibited are punishable by imprisonment for from two to ten years (351.21).

b. Proper Civil and Racial Status.—No provision.

c. Proper Legal Status.—A marriage shall not be contracted while either party has a spouse living (245.03), and if contracted may be annulled for such cause on suit of either party (247.02). *The marriage of a person already married is absolutely void (18, 19, 20) without legal process (21) notwithstanding the ignorance and good faith of the other party to the subsequent marriage (18). Annulment is allowed by statute only as a means of adjudicating the facts (19).* A person guilty of polygamy is punishable by imprisonment for from one to five years or fine of from $200 to $1000 (351.02). This does

not extend to a person whose spouse shall have continually remained beyond the sea or shall have voluntarily withdrawn and remained absent for seven years together, the party marrying again not knowing the other to be living within that time, nor to a person divorced (351.03). *In prosecution for bigamy the prior marriage must be proved valid (22).*

Marriage within one year after entry of judgment of divorce is unlawful and void (245.03). *A mere order of judgment for divorce does not affect the status of the parties and allow of remarriage (23) unless the lack of entry thereof was a mere oversight on the part of the clerk of court (21). Not only does the prohibition make marriage within the forbidden period void (16, 24, 25); not being penal but rather expressing public policy, it makes void within the period the marriage of citizens of this state no matter where contracted (15, 17). Is not the prohibitory law an integral part of the divorce decree which must be given full faith and credit in all states, making the parties incapable of marriage anywhere and any attempted marriage devoid of validity (15)? During the period of a year the court has control to see that the conditions of the decree are observed, and remarriage by one party in another state within the year allows the other party to have the divorce set aside for recrimination (26). A formal ceremony of marriage performed in a foreign country in a church by a person assuming the office of priest, especially if followed by cohabitation, raises a presumption of a valid marriage and puts on the person attacking it the burden of proving its invalidity (27).*

d. Proper Consent of Parties.—Marriage is a civil contract to which the consent of parties capable in law of contracting is essential (245.01). A marriage may be annulled on suit of the innocent and injured party for fraud, force, or coercion existing at the time of marriage, unless confirmed by acts of the injured party (247.02). *Concealment of a loathsome venereal disease that seriously and physically affects the innocent spouse is fraud allowing of annulment (28). Though concealment of unchastity or false representation as to the previous chastity of the woman to induce the man to marry her is not such fraud as will render a subsequent marriage void, where the previous unchaste conduct, unknown to the husband, has led to pregnancy existing at the time of marriage annulment is allowed (29), and that even though the man himself had had antenuptial relations with the woman if she falsely represented that he was the cause of her pregnancy (30). A marriage may not be annulled for false representation of age where the actual age would not render the marriage voidable (6) or, even if it would render the marriage voidable, if the represented age were still under that required for parental consent, for then there is still no asser-*

tion of absence of any legal impediment (5). [But is absence of parental consent, which does not make a marriage voidable, a legal impediment the same as nonage which does?—G.M.] A promise to go through a Catholic marriage ceremony and refusal to do so subsequent to another ceremony between the parties, or false representation that a former spouse had died when in fact divorced, do not allow of annulment regardless of how large an inducement such representations might be to persons of certain religious beliefs (31). Persuasion of relatives and marriage out of pity are not adequate grounds for annulment for fraud or coercion (8). Though cohabitation for months after discovery of fraud may confirm a voidable marriage (8), merely continuing to live in the same house but discontinuing all sexual relations does not constitute ratification (28).

5. STATE SUPERVISION

The State Registrar of Vital Statistics shall prescribe model forms for blank applications, statements, consent of parents, affidavits, licenses, marriage certificates, and other forms, and shall furnish them to county clerks at the expense of the county (245.20; 69.06). The local registrar of vital statistics keeps marriage records as directed by the state registrar (69.16; 69.23). The state registrar shall issue instructions as to registration; he shall publish vital facts; he may require further information (69.07), such as the records of the county clerk in order to check returns of the local registrar (69.47); and in the exercise of supervisory power over local registrars he may investigate irregularities and report to the prosecuting attorney of the proper county such violations as require court proceedings, the Attorney General assisting upon request (69.08).

6. INTERSTATE RELATIONS

If a resident of this state intending to remain so resident, who is prohibited from marriage under its laws, contracts in another jurisdiction a marriage prohibited and declared void by the laws of this state, such marriage is void in this state. A marriage contracted in this state by a resident of another jurisdiction, intending to remain so resident, is void in this state if it would be void if contracted in such other jurisdiction (245.04). *Although in general a marriage valid where contracted is valid everywhere (11, 32), a marriage comes from a sister state with all its infirmities as well as its strength—if voidable where contracted and contrary to the policy of this state also, it may be annulled here (11). An exception to the rule of the validity*

of a marriage valid where contracted is a marriage void on grounds of the public policy of the parties' domicil (15, 17). Such a policy is expressed by our statute prohibiting remarriage within a year after divorce [see 245.03 under 4c], *such marriages between citizens of this state being void no matter where contracted (15, 16). And conversely, reasonable restrictions of other states on grounds of public policy should be enforced in states having a similar policy: the marriage of citizens of one state contrary to the public policy of that state will not be recognized as valid here though valid where contracted (17). The Evasions Act renders null and void only such pretended marriages as the parties thereto are prohibited from contracting under any circumstances according to our laws, such as bigamous or consanguineous marriages, and such form of marriages as can receive no validity by reason of license, parental consent, physical examination, or other statutory requirements (6). The statute of another state prohibiting remarriage after divorce has no extraterritorial effect to prevent a lawful marriage elsewhere if not expressive of public policy (33) or if the parties have changed their domicil (32).*

7. SEX OFFENSES AND MARRIAGE

Subsequent intermarriage of the parties may be pleaded in bar of conviction for seduction (351.07).

WISCONSIN CASES

1. Thompson v. Nims, 83 W. 261 (1892). **2.** Eliot v. Eliot, 77 W. 634 (1890). **3.** Swenson v. Swenson, 179 W. 536 (1923). **4.** State v. Cone, 86 W. 498 (1893). **5.** Eliot v. Eliot, 81 W. 295 (1892). **6.** Lyannes v. Lyannes, 171 W. 381 (1920). **7.** Peterson v. Widule, 157 W. 641 (1914). **8.** Hempel v. Hempel, 174 W. 332 (1921). **9.** Roether v. Roether, 180 W. 24 (1923). **10.** Kuehne v. Kuehne, 185 W. 195 (1924). **11.** Kitzman v. Werner [Kitzman v. Kitzman], 167 W. 308 (1918). **12.** Estate of Jansa, 169 W. 220 (1919). **13.** Martin v. Ryan, 2 Pinney 24 (1847). **14.** Becker v. Becker, 153 W. 226 (1913). **15.** Lanham v. Lanham, 136 W. 360 (1908). **16.** Severa v. Berenak, 138 W. 144 (1909).

17. Hall v. Industrial Commission, 165 W. 364 (1917). **18.** Williams v. Williams, 46 W. 464 (1879); 63 W. 58 (1885). **19.** Wheeler v. Wheeler, 76 W. 631 (1890). **20.** Spencer v. Pollock, 83 W. 215 (1892). **21.** Zahorka v. Geith, 129 W. 498 (1906). **22.** Weinberg v. State, 25 W. 370 (1870). **23.** State v. Eaton, 85 W. 587 (1893). **24.** Oborn v. State, 143 W. 249, 265 (1910). **25.** Arm-

strong v. Industrial Commission, 161 W. 530 (1915). **26.** White v. White, 167 W. 615 (1918). **27.** Lanctot v. State, 98 W. 136 (1897). **28.** C—— v. C——, 158 W. 301 (1914). **29.** Varney v. Varney, 52 W. 120 (1881). **30.** Winner v. Winner, 171 W. 413 (1920). **31.** Wells v. Talham, 180 W. 654 (1923). **32.** Owen v. Owen, 178 W. 609 (1922). **33.** Frame v. Thormann, 102 W. 653 (1899); affirmed, 176 U.S. 350 (1900).

WYOMING

REFERENCES: Wyoming Compiled Statutes, 1920; Session Laws of Wyoming, 1921, 1923, 1923 (special session), 1925, 1927; Reports through Volume 33.

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to sections of the Compiled Statutes and session laws amending them. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Wyoming section.*]

1. THE MARRIAGE LICENSE

a. Requirement.—Previous to the solemnization of any marriage a license for that purpose must be obtained (4958). *The requirement is directory only, and absence of a license does not invalidate a marriage (1).*

b. Issuer.—License is obtained from the county clerk of the county wherein the marriage is to take place (4958).

c. Compensation of Issuer.—The county clerk shall collect and turn into the county treasury a fee of $2.00 for issuing and recording marriage license (1504), and shall receive an annual salary (1486).

d. Personal Appearance by Candidates.—No provision.

e. Advance Notice and Objections.—No provision.

f. Minimum Age.—At the time of marriage the male must be at least eighteen and the female sixteen years (4956). When application for a license is made, the county clerk shall ascertain that the parties are of sufficient age to be capable in law of contracting marriage (4960), and if it appear that either party is legally incompetent or that there is any impediment, the clerk shall refuse the license (4961). In case a person marries under the age of legal consent and separates from the spouse during such nonage, the marriage is voidable (4984), and the petition for annulment may be exhibited by the parent or guardian of such minor (4986).

g. Parental Consent.—When either party is a minor—under twenty-one years (5899)—no license shall be granted without the

oral or written consent of the father, if living, if not, then of the mother or of the guardian, which written consent shall be proved by the testimony of at least one competent witness (4959). If it appears that either party is a minor and the consent mentioned has not been given, the clerk shall refuse a license (4961).

h. Mental and Physical Qualifications.—It shall be unlawful for a person having a venereal disease in an infectious stage or syphilis in a transmissible stage to contract marriage in this state (L. 1921, ch. 160, §15). Every male applicant for a marriage license must produce a certificate from a licensed physician practicing in the state, dated within ten days, showing him free from any venereal disease in a communicable stage (L. 1921, ch. 160, §16). *Penalty.* Any person violating these provisions or knowingly making a false certificate is punishable by fine not exceeding $1000, imprisonment not exceeding one year, or both (L. 1921, ch. 160, §17). [The Attorney General rendered an opinion, 7 December, 1921, that this legislation is unconstitutional as not expressing in its title the subject embraced. Under §3615, as amended L. 1921, ch. 160, §13, giving it the power to prescribe rules for the control of communicable diseases, the State Board of Health, however, prescribed regulations (18 June, 1923) to the same purport as those in L. 1921, ch. 160, §§15, 16.—G.M.] Marriages contracted when either party is insane or an idiot are void without decree (4983). [As to license issuance where an impediment or incompetency exists, see 4960 and 4961 under 1k. As to prohibition of solemnization in such cases, see 4957 under 2g.]

i. Form of License.—No provision.

j. Record of License.—The county clerk shall enter the facts [see 1k] and date of license (4960).

k. Other Provisions.—The county clerk, by the testimony of some competent witness and of the applicant, shall ascertain the names and residences of the parties and whether there be any legal impediment according to the laws of the state of their residence (4960), and if it appear that there is any impediment or legal incompetency according to the law of the state of their residence or of this state, the clerk shall refuse the license (4961).

2. SOLEMNIZATION

a. Officiant.—Marriage may be performed by every judge and court commissioner of any district court, justice of the peace, and

licensed or ordained minister of the gospel (4962), and by any religious society according to its customs (4969).

b. Officiant's Credentials.—No provision.

c. Presentation of License.—No provision.

d. Form of Ceremony.—No particular form is required, but the parties shall solemnly declare in the presence of the officiant and at least two other attending witnesses that they take each other as husband and wife (4963). *The mere fact that the marriage ceremony is read to the parties by an unauthorized person does not show an agreement to become husband and wife* (*2*). Any religious society may join in marriage members of the society according to its customs (4969).

e. Common Law Marriage.—No statutory provision. *Though cohabitation and reputation as husband and wife may create a presumption of marriage, that does not directly establish the marriage, and such reputation must be generally uniform throughout the community* (*2*).

Relations originally meretricious are presumed so to continue after removal of an impediment to marriage until affirmative evidence shows the intention to become matrimonial (*2*).

f. Irregular Solemnization.—The validity of a marriage solemnized before any person professing to be an authorized officiant shall not be affected by such person's want of jurisdiction or authority if consummated with the belief of the parties, or either of them, that they were lawfully married (4968). *Penalty.* A person undertaking to join others in marriage, knowing that he is not legally authorized, shall be punished by fine not exceeding $500 or imprisonment not exceeding one year (4967).

g. Other Provisions.—Marriages declared void in no case shall be solemnized (4957). [See 4983 under 1h, 4a, 4c.] *Penalties.* A person undertaking to join others in marriage knowing any legal impediment shall be punished by fine not exceeding $500 or imprisonment not exceeding one year (4967). Whoever shall knowingly solemnize a miscegenetic marriage may be punished by fine of from $100 to $1000, imprisonment of from one year to five years, or both (4973). [See 4972 under 4b.]

3. THE MARRIAGE RECORD

a. Marriage Certificates.—The officiant shall give to the parties on request a certificate specifying the names, ages, and residence of

the parties, names and residences of at least two witnesses, and the time and place of marriage (4964), and within three months shall deliver a similar certificate to the county clerk of the county where the marriage took place (4965). This requirement for transmittal of a certificate to the county clerk applies also to clerks or presiding officers of religious societies wherein marriages are solemnized (4969). *Penalty.* Any such person failing to deliver the certificate to the county clerk, or wilfully making a false certificate, shall be punished by fine not exceeding $500 or imprisonment not exceeding one year (4967).

b. Local Record.—The county clerk shall record all such returns within one month after receipt (4966). *Penalty.* A county clerk neglecting to record such certificate or wilfully making a false record shall be punished by fine not exceeding $500 or imprisonment not exceeding one year (4967).

c. State Record.—No statutory provision. [By virtue of §3615, as amended L. 1921, ch. 160, §13, giving it the power to prescribe rules for the control of communicable diseases, the State Board of Health provided (18 June, 1923) that county clerks shall forward to such board a monthly report of all marriages contracted in their counties.—G.M.]

d. Evidence.—The original certificate and record of marriage made by the officiant, and the record thereof or a certified copy made by the county clerk, shall be presumptive evidence of the fact of marriage (4970). *A certificate of an officiant and the record of the issuance of a marriage license are admitted as evidence of marriage (1).*

4. OTHER REQUISITES

a. Proper Relationship.—See chart, page 477. Marriages are void without decree between such blood relatives (4983). [As to prohibition of solemnization, see 4957 under 2g.] *Penalty.* Sexual intercourse between a parent and child or brother and sister is punishable by imprisonment in the penitentiary for not more than five years or in jail for not more than twelve months (7194). [The marriage of other named relatives being void, cohabitation thereunder would be punishable as fornication by fine not exceeding $100 or imprisonment not exceeding three months (7195).—G.M.]

b. Proper Civil and Racial Status.—All marriages of a white person with Negroes, mulattoes, Mongolians, or Malays contracted in

Wyoming are illegal and void (4972). *Penalty.* A person contracting a marriage in fact contrary to this provision shall be punished by a fine of from $100 to $1000, imprisonment of from one year to five years, or both (4973). [As to penalty for solemnization, see 4973 under 2g.]

c. Proper Legal Status.—Marriages contracted when either party has a spouse living are void without any decree (4983). [As to prohibition of solemnization, see 4957 under 2g.] Whoever marries again during the lifetime of a former spouse, the marriage being undissolved and no legal presumption of death having arisen, shall be imprisoned not exceeding five years (7193). Within one year from a divorce neither party shall remarry any other person (5017). *Penalty.* Violation of this prohibition is punishable by fine of from $25 to $100 or imprisonment not exceeding three months (5017). *A marriage validly contracted in another state within the forbidden period after a divorce in Wyoming is valid notwithstanding this prohibition and penalty (3).*

d. Proper Consent of Parties.—Marriage is a civil contract to which the consent of parties capable of contracting is essential (4955). If the consent of one party was obtained by force or fraud and there has been no subsequent voluntary cohabitation, the marriage is voidable (4984). *Mere false representations as to family, fortune, or external conditions, such as the affection of one party for the other, do not constitute fraud sufficient for annulment of a marriage (4).*

5. STATE SUPERVISION

No provision.

6. INTERSTATE RELATIONS

Marriages valid where contracted are valid in Wyoming (4972). [As to refusal of license if a legal impediment exists according to the law of the parties' residence, see 4960 and 4961 under 1k.] *The statute merely expresses the common law rule to which there are two exceptions: marriages contrary to the law of nature as interpreted in Christian countries and marriages expressly declared contrary to the public policy of the state (3).*

WYOMING CASES

1. Connors v. Connors, 5 W. 433 (1895). **2.** Weidenhoft v. Primm, 16 W. 340 (1907). **3.** Hoagland v. Hoagland, 27 W. 178 (1920). **4.** Metz v. Blackburn, 9 W. 481 (1901).

FEDERAL

REFERENCES: United States Code 1926; Supplement, including Laws of Sixty-ninth Congress; Consular Regulations of the United States of America, 1926;[1] Reports through Volume 271 United States and 16 Federal (Second Series).

[*Roman type is used for all summaries of statutes or portions of statutes, and italic is used for summaries of court decisions. Numbers that follow statute summaries refer to title and section of the Code unless specifically citing the Consular Regulations. Numbers that follow summaries of court decisions refer the reader to the titles of these decisions that are listed at the end of this Federal section.*]

1. THE MARRIAGE LICENSE

Mental and Physical Qualifications.—No statutory provision. *The marriage of a lunatic or insane person is absolutely void unless declared by statute to be merely voidable (1).*

2. SOLEMNIZATION

Officiant.—Consular officers are forbidden to solemnize marriages in any case (Consular Regulations, ¶417).

Form of Ceremony.—Marriages in the presence of any consular officer of the United States in a foreign country between persons who would be authorized to marry if residing in the District of Columbia shall be valid and have the same effect as if solemnized within the United States (22:72). The statute does not authorize a

[1] The President is authorized to prescribe regulations and to issue orders and instructions, not inconsistent with the Constitution or a law of the United States, in relation to the duties of all diplomatic and consular officers (U.S. Code 22:132). Consular regulations made under the provisions of this section have the same binding force and effect as statutory law (see U.S.v. Eliason, 16 Pet. 291; ex parte Reed, 100 U.S. 13; and other decisions cited in the Consular Regulations, p. V.). The Consular Regulations were prescribed by executive order, 31 December, 1896.

consul to perform marriages himself and does not invalidate marriages not in his presence; in view of the states' exclusive jurisdiction in such matters the statute probably is not operative outside the District of Columbia and the territories (Consular Regulations, ¶420). *Marriages by proxy would be recognized in any state where common law marriages are recognized (2).*

Common Law Marriage.—No statutory provision. *To constitute marriage at common law a contract* per verba de praesenti *suffices and, though this may be changed by statute, the presumption is that formal requirements are directory only unless the statute contains express words of nullity (3). To constitute marriage in the Spanish colonies all that was necessary was consent joined with a will to marry (4).*

Other Provisions.—*When a statute imposes a penalty on an officer for solemnizing a marriage under certain circumstances but does not declare the marriage void, the marriage is valid notwithstanding the penalty on the officer (5, dictum).*

3. THE MARRIAGE RECORD

Marriage Certificates.—Any consular officer witnessing a marriage in a foreign country in all cases shall give to the parties married a certificate of such marriage and shall send another certificate thereof to the Department of State, which certificate shall specify the names of the parties, their ages, places of birth, and residence (22:72). The certificate must also give the date and place of marriage, must certify that it took place in the consul's presence, and must be under official seal of the consulate (Consular Regulations, ¶419). [Certification of marriages in the Territories of the United States (Code, 18:519; Criminal Code, §319), being considered a part of the law of each territory only, is not included.—G.M.]

Official Record.—The certificates of marriages in the presence of a consular officer in a foreign country shall be kept by the Department of State (22:72). The master of every vessel required to have a log book shall make entry therein of every marriage taking place on board, with the names and ages of the parties (46:201). *Though a registry of marriage may be required by statute to be kept, the validity of a marriage is not affected by absence of, or error in, an entry (6, dictum).*

Evidence.—Copies of records in any of the executive departments, under seal, shall be admitted in evidence equally with the originals

(28:661). All records kept in a public office of any state or territory shall be admitted in any court of any other state or territory by attestation of the keeper of such records and certification and authentication in the manner herein prescribed (28:688). The certificate of marriage filed with the probate court in territories or the record thereof shall be prima facie evidence, but such marriages may be proved also by evidence otherwise legally admissible (18:519). The marriage of a white man with an Indian woman, member of a tribe, may be proved by cohabitation and repute, admissions and other circumstantial evidence (25:183).

4. OTHER REQUISITES

Proper Relationship.—See chart, page 477 (18:517). *Penalty.* Persons knowingly marrying within the stated degrees shall be imprisoned for not more than fifteen years (18:517). [Note: This provision applies to all places within the exclusive jurisdiction of the United States (18:511).]

Proper Civil and Racial Status.—No statutory provision. *A state statute providing punishment for a resident of the state contracting a miscegenetic marriage outside the state as well as in the state is not unconstitutional under the contract clause (Art. I, §10), marriage not being a contract within its meaning, or under the Fourteenth Amendment, marriage not being the right of a citizen of the United States as such (7).*

Proper Legal Status.—Every person having a spouse living who marries another shall be fined not more than $500 and imprisoned for not more than five years, unless the spouse by the former marriage shall have been absent for five successive years, not known to such person to be living, and believed by him dead, or unless the former marriage has been dissolved or pronounced void (18:513). [Note: This provision applies to all places within the exclusive jurisdiction of the United States (18:511).] *The polygamy statute is not unconstitutional as prohibiting the free exercise of religion; it affects not opinions but acts subversive of good order according to our social system (8).*

5. FEDERAL SUPERVISION

To secure uniformity in the registration of vital statistics the Surgeon General of the Public Health Service shall prepare and distribute suitable forms for the collection and compilation of such

statistics, which statistics shall be published by the Public Health Service as part of its reports (42:30).

6. INTERSTATE RELATIONS

The principle of international law being that the law of the place of solemnization shall determine the mode of solemnization when practicable, consuls acting as official witnesses should see that the requirements of the law of such place have been, as far as practicable, complied with (Consular Regulations, ¶421). *Though a marriage valid where contracted is valid everywhere* (*2*), *if not bigamous, incestuous, or contrary to public policy* (*7*), *both parties must be within the jurisdiction of the laws which make it valid* (*9*) *if the law of that jurisdiction so requires* (*10*). *Disabilities imposed by judicial decree for punishment and not for the benefit of another person, such as disqualification of the guilty party to a divorce to marry again, are strictly penal and have no extraterritorial operation* (*11, dictum*).

FEDERAL CASES

1. Sothern v. U.S., 12 Fed. (2d) 936 (1926). **2.** Ex parte Suzanna, 295 Fed. 713 (1924). **3.** Meister v. Moore, 96 U.S. 76 (1877); reversing Fed. Cas. No. 9398 (1874). **4.** Hallett v. Collins, 10 How. 174 (1850). **5.** National Bank v. Matthews, 98 U.S. 621, 627 (1878). **6.** Bank of U.S. v. Dandridge, 12 Wheat. 64, 81 (1827). **7.** Ex parte Kinney, 3 Hughes 9 (1879); also, Fed. Cas. No. 7825. **8.** Reynolds v. U.S., 98 U.S. 145 (1878). **9.** In re Lum Lin Ying, 59 Fed. 682 (1894). **10.** Great Northern Railway Co. v. Johnson, 254 Fed. 683 (1918). **11.** Huntington v. Attrill, 146 U.S. 657, 673 (1892).

RELATIONSHIPS WITHIN WHICH A MAN IS PROHIBITED FROM MARRYING

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Women Are Prohibited from Marrying within Corresponding Degrees

	Mother	Daughter	Grandmother	Granddaughter	Sister	Aunt	Niece	Grandaunt	First Cousin	Grandniece	First Cousin Once Removed	Second Cousin	Father's Wife (Stepmother)	Son's Wife	Grandfather's Wife	Grandson's Wife	Wife's Mother	Wife's Daughter (Stepdaughter)	Wife's Grandmother	Wife's Granddaughter
Alabama	x	x		x	x[1]	x[12]	x[1]						x	x[13]				x		x
Arizona[2]	x	x	x	x	x[1]	x	x		x											
Arkansas[2]	x	x	x	x	x[1]	x	x		x											
California[3]	x	x	x	x	x	x	x													
Colorado[2]	x	x	x	x	x[1]	x	x		x[22]											
Connecticut	x	x	x	x	x	x	x						x					x		
Delaware[3]	x	x	x	x	x	x	x		x											
District of Columbia	x	x	x	x	x	x	x						x	x	x	x	x	x	x	x
Florida[4]	x	x	x	x	x	x	x													
Georgia[5]	x	x	x	x	x	x	x						x	x			x	x		x
Idaho[3]	x	x	x	x	x[1]	x	x		x											
Illinois[2]	x	x	x	x	x[1]	x	x		x											
Indiana[6]	x	x	x	x	x	x	x	x[20]	x	x[21]	x									
Iowa		x		x	x	x	x		x				x[13]	x[13]		x[13]	x	x		
Kansas[2]	x	x	x	x	x[1]	x	x		x											
Kentucky	x	x	x	x	x	x	x			x			x[11]	x[11]	x[11]	x[11]	x[11]	x[11]	x[11]	x[11]
Louisiana[3]	x	x	x	x	x[1]	x	x		x											
Maine	x	x	x	x	x	x	x						x	x	x	x	x	x	x	x
Maryland	x	x	x	x	x	x	x						x	x	x	x	x	x	x	x
Massachusetts	x	x	x	x	x	x	x						x[11]	x[11]	x[11]	x[11]	x[11]	x[11]	x[11]	x[11]
Michigan	x	x	x	x	x	x	x		x				x	x	x	x	x	x	x	x
Minnesota[6]	x	x	x	x	x	x	x	x[20]	x	x[21]	x									
Mississippi	x	x	x	x	x[1]	x	x		x				x	x[13]				x		x
Missouri[2]	x	x	x	x	x[1]	x	x		x											
Montana[3]	x	x	x	x	x[1]	x	x		x											
Nebraska	x	x	x	x	x	x	x		x											
Nevada[6]	x	x	x	x	x	x	x	x[20]	x[1]	x[21]	x									
New Hampshire		x		x	x	x	x		x				x[13]	x[13]		x[13]	x	x		
New Jersey[3]	x	x	x	x	x[1]	x[1]	x[1]													
New Mexico[2]	x	x	x	x	x[1]	x	x													
New York[3]	x	x	x	x	x[1]	x	x													
North Carolina	x	x	x	x	x	x	x		x[15]											
North Dakota[2]	x	x	x	x	x[1]	x	x		x[1]											
Ohio	x	x	x	x	x	x	x	x[20]	x	x[21]	x									
Oklahoma[3]	x	x	x	x	x[1]	x	x		x			x	x					x		
Oregon	x	x	x	x	x[1]	x[1]	x[1]		x[1]											
Pennsylvania	x	x		x	x	x			x				x	x				x		x
Rhode Island	x	x	x	x	x	x	x						x	x	x	x	x	x	x	x
South Carolina	x	x	x	x	x	x	x						x	x	x	x	x	x	x	x
South Dakota[3]	x	x	x	x	x[1]	x	x		x[1]				x							
Tennessee[3]	x	x	x	x	x[1]	x	x[1]			x[1, 21]			x	x[8]		x[8]		x[7]		x[7]
Texas	x	x		x	x[1]	x[1]	x[1]						x[13]	x[13]				x		x
Utah[3, 10]	x	x	x	x	x[1]	x	x	x	x	x										
Vermont	x	x	x	x	x	x	x						x[11]	x[11]	x[11]	x[11]	x[11]	x[11]	x[11]	x[11]
Virginia	x	x	x	x	x[1]	x	x[18]						x[11]	x[11]				x[11, 17]		x[11]
Washington[6]	x	x	x	x	x	x[1]	x[1]	x[20]	x[1]	x[21]	x[1]									
West Virginia	x	x	x	x	x[1]	x	x[16]		x[14]				x[11]	x[11]				x[11, 17]		x[11]
Wisconsin[6]	x	x	x	x	x	x	x	x[20]	x[19]	x[21]	x									
Wyoming	x	x	x	x	x[1]	x	x		x											
Federal	x	x	x	x	x	x	x													

[1] Prohibits marriage between persons so related by the whole or by the half blood.

[2] Prohibits marriage between grandparents and grandchildren of every degree.

[3] Prohibits marriage between ancestors and descendants.

[4] Prohibits marriage between persons related by lineal consanguinity.

[5] Prohibits marriage within the Levitical degrees of consanguinity.

[6] Prohibits marriage between persons nearer of kin than second cousins.

[7] Prohibits marriage with any lineal descendant of a spouse.

[8] Prohibits marriage with the spouse of any lineal descendant.

[9] Prohibits marriage with the lineal ancestor or descendant of either parent.

[10] Prohibits marriage between persons related within and not including the fifth degree of consanguinity.

[11] Provides continuance of prohibition notwithstanding dissolution of marriage by death or divorce.

[12] Includes widow or divorced wife.

[13] Stated as "widow."

[14] Includes double cousins.

[15] Includes double first cousins only.

[16] Includes wife of nephew.

[17] Includes stepdaughter.

[18] Prohibits woman from marrying husband of niece.

[19] Allows marriage of first cousins where female is over fifty years.

[20] Prohibits marriage also with great-grandaunt.

[21] Prohibits marriage also with great-grandniece.

[22] See text, p. 74.

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